

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APRIL TERM, 1939

No. 7442

490

SPECIAL CALENDAR

WILLIAM F. JOHNSON, APPELLANT

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

FILED JUNE 19, 1939

JUDGE D. LAWRENCE GRO
UNITED STATES COURT OF AP
WASHINGTON, D. C.

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DISTRICT OF COLUMBIA

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WILLIAM F. JOHNSON, APPELLANT

vs.

UNITED STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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1 DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

Criminal No. 63399

UNITED STATES OF AMERICA

vs.

WILLIAM F. JOHNSON

United States Court of Appeals for the District of Columbia.
Filed June 19, 1939. Joseph W. Stewart, Clerk.

Notice of appeal

William F. Johnson, 482 M Street, S. W., Washington, D. C.

(Name and address of appellant)

J. Frank O'Brien & John E. Chadwick, 503 F. Street, N. W., D. C.

(Name and address of appellant's attorney)

Offense First Degree Murder.

Date of judgment March 2, 1939.

Brief description of judgment or sentence Death.

Name of prison where now confined, if not on bail Washington,
Asylum & Jail.

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

WILLIAM F. JOHNSON,
Appellant.

J. FRANK O'BRIEN,
J. Frank O'Brien,
JOHN E. CHADWICK,
John E. Chadwick,
Attorneys for Appellant.

Date June 19, 1939.

Service accepted.

ARTHUR McLAUGHLIN.

6-19-39.

Grounds of appeal

1. The trial court erred in refusing instructions offered by defendant.

2. The trial court improperly instructed the jury.

3. The trial court erred in refusing a new trial upon the ground that new and material facts were discovered after trial.

4. The trial court erred in its instructions to the jury by dwelling upon facts and circumstances which were not in evidence and which were not supported by the evidence in the case.

5. The trial court erred in overruling the defendant's motion for a new trial.

A true copy.

Test.

CHARLES E. STEWART,
Clerk.

B. ELOISE NAPHEN,
Asst. Clerk.

2 District Court of the United States for the District of
Columbia

Clerk's statement of docket entries to accompany duplicate notice of appeal to the Court of Appeals.

Criminal No. 63399

UNITED STATES OF AMERICA

vs.

WILLIAM F. JOHNSON

United States Court of Appeals for the District of Columbia.
Filed June 19, 1939. Joseph W. Stewart, Clerk.

Docket entries

1939

- Jan. 25—Presentment and indictment filed.
Jan. 27—Arraigned, Plea Not Guilty, Indictment read, Myer Koonin and John E. Chadwick assigned by Court to defend.
Feb. 7—Appearance of J. Frank O'Brien entered for defendant.
Feb. 23—Copy list of Witnesses and Jurors served.
Feb. 28—Jurors from Criminal Division Numbers One and Two and Civil Divisions sworn on voir dire, Jury sworn and respited until tomorrow.
Mar. 1—Trial resumed, same jury; respited until tomorrow.
Mar. 2—Trial resumed, same jury; Argument of counsel and charge of Court, Verdict, Guilty of Murder in the First Degree.
Mar. 6—Motion for a new trial filed.
Mar. 16—Affidavit of Robert Thomas filed.
Mar. 17—Affidavit of J. Frank O'Brien filed.
Mar. 17—Motion for a new trial argued and submitted.
3 Apr. 3—Motion for new trial on ground of newly discovered evidence argued and submitted.
May 5—Motion for new trial further heard, Testimony taken and again submitted.
June 16—Motion for new trial heretofore submitted, overruled, Exception. Sentenced to death by electrocution to take effect on August 10, 1939.
June 19—Notice of appeal filed, Order to proceed in Forma Pauperis filed (see order) (Proctor J.).

Date June 19, A. D. 1939.

Attest:

[SEAL]

CHARLES E. STEWART,

Clerk.

By B. ELOISE NAPHEN,

Assistant Clerk.

NOTE.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules 7, 8, and 9, of Supreme Court U. S.

4 United States District Court, District of Columbia
Criminal Division

No. 63399

UNITED STATES

vs.

WILLIAM F. JOHNSON

United States Court of Appeals for the District of Columbia.
Filed June 19, 1939. Joseph W. Stewart, Clerk.

Pauper affidavit and order

AFFIDAVIT OF WILLIAM F. JOHNSON

DISTRICT OF COLUMBIA, ss.:

William F. Johnson, being duly sworn according to law, deposes and says that he is the defendant in the above-entitled action; that he is a citizen of the United States, and that because of his poverty he is unable to pay the costs of said action or to give security therefor.

WILLIAM F. JOHNSON.

Sworn to and subscribed before me this 19th day of June, 1939.

RICHARD H. WOODWARD.

Notary Public, D. C.

ORDER OF COURT

It is Ordered that the Def. in the above-entitled action be, and he hereby is, permitted to prosecute said appeal to conclusion without prepayment of fees or costs.

JAMES M. PROCTOR,

District Judge.

Dated June 9, 1939.

A true copy.

Test:

[SEAL]

CHARLES E. STEWART,

Clerk.

By B. ELOISE NAPHEN,

Asst. Clerk.

5 In the District Court of the United States
For the District of Columbia

Criminal No. 63399

UNITED STATES

vs.

WILLIAM F. JOHNSON

United States Court of Appeals for the District of Columbia.
Filed Aug. 25, 1939. Joseph W. Stewart, Clerk.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

6 *Indictment*

Filed in Open Court January 25, 1939

District Court of the United States for the District of Columbia

Holding a Criminal Term

January Term, A. D. 1939

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one William F. Johnson, on, to wit, the eighteenth day of December, 1938, and at the District of Columbia aforesaid, contriving and intending to kill one George Scandalis, then and there being, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did discharge and shoot off a bullet out of a pistol held in the hand of him, the said William F. Johnson, into the abdomen of the said George Scandalis; and that he, the said William F. Johnson, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did discharge and shoot off a certain other bullet out of the said pistol held in the hand of him, the said William F. Johnson, into the chest of the said George Scandalis, and thereby did give to the said George Scandalis, in and upon the abdomen of the said George Scandalis, and in and upon the chest of the said George Scandalis, certain mortal wounds, of which said mortal wounds he, the said George Scandalis, on, to wit, the said eighteenth day of December, 1938, and at and within the District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said William F. Johnson, in the manner and by the means aforesaid, feloniously, wilfully, pureposely and of his deliberate and premeditated malice, did kill and murder the said George Scandalis; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

DAVID A. PINE,
*Attorney of the United States in
and for the District of Columbia.*

[Endorsed:] Criminal No. 63399. United States vs. William F. Johnson. First Degree Murder. A true bill: L. Bert Nye, Foreman.

District Court of the United States for the District of Columbia
Friday, January 27'' A. D. 1939

The Court resumes its session pursuant to adjournment: Mr. Justice ADKINS, presiding.

* * * * *

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail; whereupon the defendant being arraigned upon the indictment, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon Myer Koonin, Esquire, and John E. Chadwick, Esquire, are appointed by the Court to defend said defendant in said cause to its conclusion.

District Court of the United States for the District of Columbia
Thursday, March 2'' A. D. 1939

The Court resumes its session pursuant to adjournment: Mr. Justice PROCTOR, presiding.

* * * * *

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; whereupon said jury after hearing the evidence in full, arguments of counsel, and the Charge of the Court, upon their oath say the defendant is guilty of Murder in the First Degree.

Motion for new trial

Filed March 6, 1939

* * * * *

Comes now the defendant by his attorney and moves this Honorable Court to set aside the verdict and grant a new trial in the above entitled cause for the following reasons:

1. That the verdict was contrary to the weight of the evidence.
2. That the verdict was contrary to the law as given to the jury by the Court.

3. That the Court erred in refusing to instruct the jury on the law as requested in defendant's prayers numbers 1, 2, 3, 6, 7, 8.
4. That new and material facts have come to light since the trial.
5. And for other reasons that will be called to the attention of the Court at the hearing of this motion.

J. FRANK O'BRIEN,
J. Frank O'Brien,
JOHN E. CHADWICK,
Attorneys for Defendant.

Affidavit of Robert Thomas

Filed March 16, 1939

* * * * *

DISTRICT OF COLUMBIA, ss.:

I, Robert Thomas, being first duly sworn on oath depose and say; that if I were at the trial of the case United States vs. William F. Johnson, I would have testified as follows:

That I was employed at the Athens Bakery, 476 L Street, S. W., on December 18, 1938, and was present at the time that George Scandalis was shot, that about 3 P. M. that afternoon, which was on a Sunday, I saw Johnson come into the bakery and go back to the oven-room where George was working, that a few minutes later I saw George come out of the oven-room with his arms around Johnson clamping Johnson's arms to his sides, then Tom, the night foreman, came over to them and took Johnson to the front door.

10 About thirty minutes later, while I was standing by the scaling machine, I again saw Johnson enter from the front office, George who at that time was coming out of the oven-room also saw Johnson, I noticed at that time that George was advancing toward Johnson in a menacing manner and I followed George. When George came to a point about three or four feet from Johnson he made a lunge for Johnson and a shot was fired. I did not see the gun or Johnson's arm at that instant, George was between Johnson and me, but I did see the flash from the pistol. George moved sideways and to his right, and again he started toward Johnson and a second shot was fired from Johnson's pistol.

When Johnson entered the back room he could not have seen George until after he had come several feet, because George was in the back of the room where I was working at the scaling machine. When I first saw Johnson, when he came in from the front office the second time, he had nothing in his hands and did not pull the pistol until after George advanced within a few feet of him.

Both George Scandalis and Johnson were friendly to me. I met Johnson several years ago and always thought highly of him. I met George about six months ago and recognized him as a boastful and very domineering person and told of having wrestled with Londos. He weighed about two hundred pounds and very powerful, had a quick temper and showed an unfriendly attitude toward Johnson.

I testified at the Coroner's inquest, but before the trial came up for hearing I was in Mountain Home, Tennessee, for hospitaliza-

tion, and did not return to Washington until the last day of the trial, at which time I went to the District Attorney's office and was informed that the Government had finished with their testimony, and that I was not needed.

ROBERT THOMAS.

11 Subscribed and sworn to be me this 15th day of March, 1939.

[SEAL]

CHARLES H. QUIMBY, 3rd,
Notary Public, D. C.

Affidavit of Defense Attorney

Filed March 17, 1939

* * * * *

DISTRICT OF COLUMBIA, ss.:

I, J. Frank O'Brien, being first duly sworn on oath depose and say; that I am the defense attorney of record in the above entitled cause; that after a jury trial and said jury returned a verdict of guilty of murder in the first degree, it was brought to my attention for the first time that one Robert Thomas was an eye witness to the shooting of George Scandalis, and testified at the Coroner's Inquest, but was not called to testify at the trial; that although I made diligent effort to locate all witnesses, I knew nothing about Mr. Thomas until several days after the trial; that Mr. Thomas submitted an affidavit as to the things and matters he would have testified to had he been called to testify at the trial, and I believe that his testimony is very important from a standpoint of justice.

J. FRANK O'BRIEN,
Attorney for Defendant.

Subscribed and sworn to before me this 17th day of March, 1939.

[SEAL]

CHARLES H. QUIMBY, 3rd,
Notary Public, D. C.

12 *Memo opinion on motion for new trial*

Filed June 9, 1939

* * * * *

I have carefully considered the motion for a new trial, especially with reference to the alleged discovery of new and material evidence. This had reference to Robert Thomas, whose affidavit was filed in support of the motion. Therein it appeared that Thomas was working in the bakery and witnessed the shooting. At the first hearing on the motion it developed that Robert Thomas testified at the Coroner's Inquest two days after the homicide in the presenc of defendant; also that he had given a signed statement to a police officer December 19th. The transcript of Thomas' testimony at the Inquest and his signed statement to police were produced and, by agreement of counsel, received. They conform substantially to the testimony of Thomas taken before me.

The affidavit of Thomas stated that "George" (Scandalis, the defendant) "was advancing toward Johnson" (the defendant) "in a menacing manner." Also that "when George came to a point about three or four feet from Johnson he made a lunge for Johnson, and a shot was fired." These statements in the affidavit seemed to differ from those of Robert Thomas given before the Coroner and police. They tended to indicate aggressive actions by Scandalis immediately before the shooting, including a lunge or striking at Johnson. Technically, for several reasons, the testimony of Robert Thomas could not be treated as newly discovered. Nevertheless, in view of the gravity of the case, I was anxious to get at the very truth of the matter first hand. Accordingly, by agreement of counsel, further consideration was postponed to await the appearance of the witness. Finally he

13 was examined in open court before defendant and his counsel. The evidence was reported and the transcript is available.

The testimony conforms substantially to the witness' previous statements to the Coroner and police. Moreover, in substance, the testimony is in line with the testimony of the government adduced at the trial as to the incidents leading up to and connected with the shooting. That testimony tended very strongly to prove that Scandalis had rebuffed defendant and ejected him from the oven room, where defendant had gone to see Scandalis, who had shortly before laid him off work; that defendant then went to his home and got a revolver, and returned to the bakery. As defendant went into the bakery, Scandalis happened to be going from the oven room to another towards the front of the building. It was evident that Scandalis' movement from the oven room had nothing to do with defendant and that their meeting was due entirely to defendant's surprise entrance into the bakery. It also seemed clear that Scandalis did not make any effort to strike or lunge at defendant until after the first shot which struck him in the abdomen. Whether he did so then is not altogether clear. It is quite likely that the shock of the fatal blow rendered his physical actions involuntary. It is clear that his first movement was to put both his hands to his side where the blow had struck. The statements in the affidavit indicating a menacing advance on defendant and an attempt to strike him before the first shot is not borne out by the testimony, or the earlier statements to the Coroner and police. The affidavit was actually prepared by Mr. O'Brien, one of defendant's attorneys, in his own words, after talking with Thomas. An honest mistake was evidently made. I have no reason to doubt the good faith of the witness or the attorney.

14 The witness has impressed me as an honest and disinterested man, endeavoring to relate correctly the circumstances to the best of his ability. His testimony, instead of helping defendant, tends strongly to corroborate in a general way the testimony presented by the government at the trial. That testimony, given by witnesses who seemed singularly free from bias, made a very clear case of a deliberate killing actuated by ill-will engendered by Scandalis' treatment of defendant in laying him off work and ejecting him from the oven room. Considered in the light of the conflicting and contradictory statements of defendant made before and at the trial, there was presented to the jury about the clearest case of first degree murder that has come within my knowledge as a prosecuting

officer or judge. Moreover, the whole trial was free of any untoward incident that might in any way have militated against a fair trial for the defendant. I feel confident the defendant was accorded a very fair trial. If I had any doubt that this was so, or that the verdict was clearly justified by the evidence, I should want the defendant to have another trial. But, under the circumstances, I am required to overrule the motion.

JAMES M. PROCTOR,
Justice.

Filed June 9/39.

District Court of the United States for the District of Columbia

Friday, June 16th A. D. 1939

The court resumes its session pursuant to adjournment: Mr. Justice PROCTOR, presiding.

* * * * *

15 Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney, John E. Chadwick, Esquire; whereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; and thereupon the Court imposed the following sentence:

Sentence

It is considered by the Court, and the sentence of the law is that you, William F. Johnson, for the offense of murder in the first degree whereof you have been found guilty, be and you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, William F. Johnson, be forthwith taken to the Washington Asylum and Jail, otherwise known as the District Jail, in the District of Columbia, from whence you came, and there be kept in close confinement; and that on the tenth day of August, A. D., 1939, you be taken to the place prepared for your execution within the walls of the said Washington Asylum and Jail, and that then and there, between the hours of ten o'clock ante meridian and two o'clock post meridian, you be electrocuted by the causing to pass through your body a current of electricity of sufficient intensity to cause your death, and that the application of such current shall be continued until you are dead, and may God have mercy on your soul.

It is further ordered that a certified copy of this sentence shall be transmitted by the Clerk of the District Court of the United States for the District of Columbia to the Superintendent of the aforesaid Washington Asylum and Jail not less than ten days
16 prior to the time fixed in this sentence of the Court for the execution of the same.

Signed this 16th day of June A. D. 1939.

JAMES M. PROCTOR,
Justice.

Order granting right to proceed in forma pauperis

Filed June 19, 1939

* * * * *

It is ordered that the def. in the above-entitled action be and he hereby is permitted to prosecute said appeal to conclusion without prepayment of fees or costs.

JAMES M. PROCTOR,
District Judge.

Dated June 19, 1939.

Order extending the time within which to submit and settle bill of exceptions

Filed July 17, 1939

* * * * *

On motion of the Defendant and for good cause shown, it is by the Court this 17th day of July 1939, ordered:

That the time for submitting Proposed Bill of Exceptions of the Defendant in the above entitled cause be, and the same is hereby, extended to and including the 20th day of July 1939.

That the time for settlement of the Bill of Exceptions in the above entitled cause be, and the same is hereby extended to and including the 18th day of August 1939.

JAS. W. MORRIS, *Justice.*

I consent.

CHARLES B. MURRAY,
Ass't Att. for the U. S.

17 *Assignment of errors*

Filed July 19, 1939

* * * * *

Comes now the defendant, William F. Johnson, by his attorneys, John Edgar Chadwick and J. Frank O'Brien, and assigns for review to the Court of Appeals for the District of Columbia, the following errors committed by the trial Court:

1. That the Court erred in admitting in evidence the sketch of the bakery premises (Government Exhibit No. 4).

2. That the Court erred in refusing to direct a verdict as to first degree murder.

3. That the Court erred in instructing the jury.

A. In commenting upon the contention of the Government as to acquisition of the gun when such contention was unsupported by the evidence.

B. In eliminating in his charge the elements of the discharge and angry rebuff suffered by the defendant, from consideration along with the defense plea of the defendant.

4. That the Court erred in refusing the defendant's prayers Nos. 1, 2, 3, 6, 7, and 8.

5. That the Court erred in refusing the defendant a new trial upon the grounds of discovery of evidence unavailable at trial.

6. That the trial taken as a whole does not fulfill the rights of the defendant to substantial justice and an impartial trial.

JOHN EDGAR CHADWICK,
J. FRANK O'BRIEN,
Attorneys for the Defendant.

18 District Court of the United States
 For the District of Columbia
 Friday, August 18'', A. D. 1939

The Court resumes its session pursuant to adjournment: Mr. Justice LETTS, presiding.

* * * * * *

Now comes here the defendant by his attorney, J. Frank O'Brien, Esquire; and prays the Court to sign, and make a part of the record his Bill of Exceptions taken during the trial of the case which is accordingly done.

Designation of record

Filed July 25, 1939

* * * * * *

The clerk of the court will please make up the record for the Court of Appeals to consist of the following:

1. The indictment.
2. The plea.
3. Verdict of the jury.
4. Affidavit of Robert Thomas.
5. Affidavit of J. Frank O'Brien.
6. Motion for a new trial.
7. Memorandum of opinion of the court overruling motion for new trial.
8. Sentence.
9. Notice of appeal.
10. Order granting right to proceed in forma pauperis.
11. Order extending time in which to submit and settle Bill of Exceptions.
12. Assignment of errors.
13. Order making Bill of Exceptions part of record.
14. This designation.
15. Bill of Exceptions.

JOHN EDGAR CHADWICK.
J. FRANK O'BRIEN.

Approved:

JAMES M. PROCTOR, *Justice.*

20 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 63399 Criminal, wherein United States is Plaintiff and William F. Johnson is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of August, 1939.

[SEAL]

C. E. STEWART, *Clerk.*

21 In the District Court of the United States for the
District of Columbia

Filed August 18, 1939

Holding a Criminal Court

Criminal No. 63399

UNITED STATES OF AMERICA

v.

WILLIAM F. JOHNSON

United States Court of Appeals for the District of Columbia.
Filed Aug. 25, 1939. Joseph W. Stewart, Clerk.

Proposed bill of exceptions

Be it remembered that this cause came on for trial before the Honorable James M. Proctor, Associate Justice of the District Court and a jury on February 28, 1939, continuing to and including the 2nd day of March 1939, the United States being represented by Arthur J. McLaughlin and the defendant being represented by Mr. J. Frank O'Brien and Mr. John Edgar Chadwick.

Thereupon, the prospective jurors were examined on the Voir Dire and a jury was selected and sworn. The Assistant United States Attorney proceeded to deliver his opening address in the course of which he advised the jury that the evidence would show as follows.

On the 18th day of December 1938, William Johnson was employed at the Athens Bakery, located at 476 L Street, Southwest. He had worked at the bakery on and off for a period of five years. Prior to December 18, he had been working there about six months. On December 17, William Johnson was approached by his foreman, George Scandalis, for whose death Johnson is now being
22 | tried, and was told that he would be laid off for a period of

two weeks. Johnson left the bakery on December 17, and returned on December 18, at about 3 o'clock. He went upstairs in the bakery and met other colored boys and discussed with them the matter of his having been laid off. He then went downstairs and back to the oven room, where he saw George Scandalis. After some conversation, George Scandalis escorted the defendant out to the front door of the bakery and told him to go on about his business, that he did not want any trouble, and if he gave him trouble he would call the police. William Johnson, returned to the bakery in about thirty or forty minutes, he walked through the store, looked into the mixing room, which is in the rear of the store, saw George Scandalis, pulled the gun from his pocket, ran in the direction of Scandalis, and when within five or ten feet of him fired twice. The defendant ran to the home of his foster mother, there emptied the gun and threw it on the table. The gun was later recovered by the police, the defendant was arrested and made certain statements pertaining to this case.

Whereupon, Mr. J. Frank O'Brien made the opening statement on behalf of the defendant, substantially as follows: The defendant, William Johnson, did not resent having been laid off by the deceased, George Scandalis, and that was not the cause of the trouble. When Johnson went to the bakery it was his purpose to ask George Scandalis the reasons for his having been laid off. When approached in the oven room, Scandalis, without reason or provocation, jumped upon the defendant injuring him. That the deceased was seventy-five or one hundred pounds heavier than the defendant. After the altercation Johnson left and returned within fifteen minutes.

23 He did not see George Scandalis approaching before he entered the mixing room, but was surprised to see Scandalis some four or five feet from the door. George Scandalis made effort to attack Johnson and it was then that Johnson fired the shot.

Counsel by stipulation admitted that the body examined by the District Coroner was the body of George Scandalis and the court then adjourned for the day to reconvene at 10 a. m., March 1.

Whereupon, the United States to maintain its part joined produced the following witnesses.

Dr. RICHARD ROSENBERG was called as first witness and testified substantially as follows: That he on December 19, performed the autopsy upon the body of one George Scandalis. That he had received two gun-shot wounds, one in the chest, one three-quarters inches below the top of the chest, the bullet traveling left to right, backward and downward. That he sustained a second wound in the abdomen just below the chest one one-half inches left of the center line. The wound running from front to back and downward. The cause of death was gun-shot wounds of the chest and abdomen, injuring the lungs, aorta, stomach, and intestines, with the accompanying hemorrhage and shock. He was 42 years of age, weighed 162 pounds, was 5 feet 6 inches tall. On cross-examination, he testified that he could not tell which wound was made first.

IRA GULLICKSON was called as the next witness for the Government and testified substantially as follows: That he is a member of the Metropolitan Police Force assigned as official pho-

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tographer. He identified certain photographs marked United States Exhibits 1, 2, and 3, for identification which photographs were taken on Sunday, December 18, shortly after 5 o'clock in the bakery located in the 400 block of L Street. Pictures were then shown to the jury. The position of the camera at the time of the taking of the pictures was given by the witness.

AUBREY M. TOLSON was called as a witness for the Government and testified substantially as follows: That he is a member of the Metropolitan police assigned to the Homicide Branch. He identified a diagram stating that he had made the diagram on December 18, 1938, that it represents the inside of the premises 476 L Street, SW. That he made the measurements shown on the sketch.

Upon objection by Mr. Chadwick, Counsel approached the bench. Counsel for the Government proposed to offer the sketch in evidence. Objection by defendant's Counsel was made to the admission of use of the sketch upon the grounds that it had not been properly identified or proven to be a true representation of the conditions existing in the bakery. At the suggestion of the court, cross examination of the witness concerning the sketch was made to determine the admissibility.

The witness testified that certain figures and dimensions indicated upon the sketch represent the measurements made by the witness, with the assistance of a second officer. The witness then testified concerning certain objects shown by the sketch. That the distances shown upon the sketch were not drawn to scale.

Counsel for defendant made formal objection to further use of the sketch upon the basis that it was admittedly not drawn
25 to scale, therefore, not a true representation of the conditions at the bakery. That the witness had not been shown to be qualified to make an accurate drawing. Objection was overruled and exception duly taken.

The witness then testified that the room in question was some eighty feet long, that in the front room of the store distance from the outside door to the partition to the mixing room was twenty-nine and one-half feet, that the dough-mixing machine located in the back room on the west wall was twenty-four feet from the partition, that the distance from the mixing machine to the oven-room door was thirty-three feet, that there was a distance of twelve feet from the blood spots in front of the mixing machine to the stove located in the corner where the body was found. The witness was then excused.

THOMAS STATHOPOLULAS was called as a witness for the Government and testified substantially as follows: That he owns the bakery shop located at 476 L Street, that he had known George Scandalis who was employed as foreman for about six months prior to December 18. That he had known the defendant, William Johnson, for some four or five years. That Johnson was employed as a helper, that George Scandalis was his boss. That he saw Johnson on Sunday, at 12 o'clock in front of the bakery, and that Johnson said nothing to him at that time. Upon cross-examination the witness stated that at times the defendant, William Johnson, who was also

known as Jerry would take out orders in the early morning, that Scandalis was not his boss when he was on this type of work. That on Saturday after Jerry had been paid off he told Jerry that he would see George Scandalis about why he had been laid off. That Scandalis was not at the bakery at that time.

26 EDWARD WEST was called as a witness on behalf of the Government and testified substantially as follows: That he lived at 427 Huntoon Court, Southwest, and worked at the Athens Bakery. That he had known the defendant, William Johnson, since June 1938. He had known George Scandalis the same length of time. That on Saturday, December 17, he saw both Johnson and Scandalis at the bakery. That he talked with Johnson and Johnson told him, "George laid me off for two weeks." That he reported for work at 3 o'clock on Sunday. That George Scandalis was there. That about twenty minutes after three o'clock Johnson came in the bakery.

MR. McLAUGHLIN. "Tell us about it in your own words."

ANSWER. "Johnson came in there and he went straight in the oven room where George was, he asked George—he asked George "Why you lay me off", and George said, "Go ahead I aint got time to fool with you". Johnson would not go away. I could not see the two, I hear them, Johnson would not go away. George had hold of Johnson in the mixing room and got hold of Johnson and took Johnson outside. About forty-five minutes Johnson came back in the door and George was coming from the oven room to the mixing machine. He looked up and saw Johnson and he yelled, "go back, don't come in here." George was going back and Johnson took out his pistol and shot him.

That the witness heard three shots and Johnson ran out the door. The witness was then asked to indicate on the chart the main entrance to the bakery. Objection by defendant's Counsel to the use of the chart over-ruled, exception granted. The defendant then indicated the oven room door, the approximate location of the mixing machine and the front door of the bakery.

27 The witness testified that during the time that he had worked there he had not seen any trouble between the defendant and George Scandalis.

WILLIE B. BROWN was called as next witness for the Government and testified substantially as follows: That he was working at the Athens Bakery during the month of December of last year, that he knew the defendant, William Johnson, and the deceased, George Scandalis. That he was at the bakery on the day of the shooting. That he saw Johnson about five minutes after three in the mixing room in the bakery. That he saw him go into the oven room, that when he was getting a drink of water he saw into the oven room and saw George grab Jerry by the arm, saying, "I don't want no trouble." At that time the crowd rushed around him. They took Jerry out of the mixing room. That he left the room and did not see Jerry leave. That he then went to another part of the bakery and he did not know of anything unusual until he heard three shots, which was about 30 or 35 minutes after Johnson was put out of the

mixing room. That he rushed back into the oven room and saw George Scandalis on the floor by the stove. That he had not seen Jerry with a gun at any time.

NICHOLAS SMITH was then called as next witness for the Government and testified substantially as follows: That he was employed in the Athens Bakery during the month of December. That he knew the defendant, Johnson, and the deceased, George Scandalis. That on December 17, he heard Scandalis say, "Johnson I have to lay you off a couple of weeks." Johnson then quit work and went upstairs to change his clothes. That he did not see Johnson again until Sunday afternoon, the following day. When he arrived at work at 3 o'clock Johnson was in the front of the store. That later in the afternoon while he was in a building next door he heard two
28 shots. He ran back to the mixing room and saw George Scandalis on the floor. Upon cross examination testified that he had never heard any arguments between George Scandalis and the defendant prior to the shooting.

GEORGE BOWSTOWRES was called as a witness for the Government and testified substantially as follows: That he is employed in the Athens Bakery. That he knew George Scandalis and the defendant, William Johnson. That when he went to work on Sunday afternoon he saw the night foreman and Jerry come out of the mixing room and go outside. That in fifteen or twenty minutes Johnson returned to the bakery with his hands in his pockets. That Jerry went upstairs and in two or three minutes came down. He looked at the little glass on the partition between the store and the mixing room and then went into the mixing room. That the witness followed Jerry into the mixing room and called "Jerry come back here." That as he went into the room the gun was shot twice. He saw Scandalis fall down and Jerry run outside. That when Scandalis was shot he was coming from the oven room towards the mixing machine. They were about five or six feet apart when the shots were fired. That he saw nothing in the hands of the deceased at the time the shots were fired. That he had never seen the defendant with a gun prior to the shooting. Upon cross examination witness testified that Jerry did not appear angry when Tom the night foreman put him out of the store. That he did not know where Jerry went between the time he was put out of the store and when he came back.

29 THOMAS STATHOPOULUS was called as the next witness for the Government and testified substantially as follows: That he was part owner in the bakery on L Street and worked on the night shift. That he knew George Scandalis and the defendant, William Johnson. That on December 18, about 3 o'clock in the afternoon, he was at the bakery and when he came into the mixing room he saw the men gathered about the scaling machine. Scandalis requested that, he, the witness take the defendant, Johnson, out of the room. The witness was unable to make himself understood further, and an interpreter, Mr. George E. Tredes, was sworn to translate the testimony. The witness then testified that after he put the defendant out of the

door he remained away about forty-five minutes. That when he returned to the bakery he drew out a gun and shot George Scandalis. The defendant did not point the gun at the witness but held it so that the witness being afraid raised his hands and stepped aside. The witness had not seen the gun prior to this entrance into the mixing room. On cross examination the witness testified that when the defendant came through the door he had one hand in his pocket, the other one just hanging. He saw no one follow the defendant into the mixing room. At the time the shots were fired the defendant was eight or ten feet from the door. He did not see Scandalis advance towards the defendant. Scandalis was standing to his right close to the barrels which were in the center of the floor when he was shot.

STEVE DEMOS was called as next witness for the Government, testified substantially as follows: That he was employed at the Athens Bakery and had been there for about a year. That he knew
30 George Scandalis and the defendant, William Johnson. That he was at the bakery at 3 o'clock on Sunday, December 18, when Johnson came through the mixing room and entered the oven room. He saw Scandalis bring Johnson out and request that Tom, the night foreman, put him outside. That Scandalis then returned to the oven room. That about forty-five minutes later he saw Johnson return to the mixing room. As he entered the room George Scandalis came from the oven room and walked towards the mixing machine. Johnson pulled a gun and shot him twice. Scandalis fell to the floor when the shots were fired. They were about eight feet apart. After the shooting the defendant, Johnson, turned and ran from the room. Upon cross examination the witness testified that at the time Scandalis had the defendant taken from the mixing room he saw Scandalis grab the defendant and twist his arm on the side of the machine. That George Scandalis was a larger man than the defendant. That at the time the shots were fired George Bowstowres was not in the mixing room behind the defendant.

ALEXANDER HALIASSOR was called as next witness for the Government and testified substantially as follows: That he was employed at the Athens Bakery and he knew George Scandalis and the defendant, William Johnson. That he was at the bakery in the afternoon of Sunday, December 18. That he saw the defendant, Johnson pass through the mixing room to the oven room sometimes about 3 o'clock. That he saw Scandalis bring Johnson out of the oven room and saw the night foreman take Johnson out of the mixing room to the front of the store. That about forty-five minutes later, while in the oven room he heard two shots, that he ran to the mixing room and saw the defendant, Johnson, running out of the front door. That Scandalis was laying on the floor.

21 WILLIAM ANTHONY was called as next witness for the Government and testified substantially as follows: That he was employed at the Athens Bakery and had worked there for three and a half years. That he knew George Scandalis and William Johnson. That on December 18 he was in the mixing room and he saw Scandalis put Johnson out of the oven room and Tom, the night foreman,

took him by the arm and led him out of the mixing room. That sometime later he saw Johnson after he had entered the mixing room with a gun in his hand.

Mr. McLAUGHLIN. Just tell me what you saw.

Answer. I saw Johnson come in with the gun. Jerry holds the gun and stood about there and I says, "A man comes with a gun he is going to shoot somebody," that is, you asked me the question. I hollered at him and George turned around, tried to walk away from him or grab him. He just make a motion. As soon as he make the motion Johnson shoot him. Then George bent down and hit the barrel and then he tried to get up again, and he hit him another one. After that Johnson walked out the middle door.

By the COURT. "What was George doing at the time Jerry shot him?"

Answer. "George, he moved up before he shot him, like that. He shoot him and he bends down and moves a little over there.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

The proceedings were resumed at 1:30 o'clock p. m. at the expiration of the recess.

LAWRENCE HALSTEAD was called as next witness for
32 Government and testified substantially as follows: That he is a member of the Metropolitan Police assigned to the 4th precinct. That he received a radio call on December 18 concerning the shooting at 476 L Street. On arriving he found a man in an unconscious dying condition. He was laying on the floor in the second room, the mixing room. He was behind a small half partition close to the stove. That he went to 1112 New Jersey Avenue SE. and in the company of Officer Best knocked at the door. The defendant told him the gun was at his mother's house on M Street. Johnson asked the witness if the man was badly shot and was told that he was in a serious condition. Johnson at that time stated that he went to the bakery and asked Scandalis, "Why did you fire me?" Scandalis told him to go away, he did not have time to talk to him and to go on out. He said he asked him a question, "Why did you fire me?" He said that Scandalis grabbed him with both hands and tried to push him around and that he broke loose, pulled his gun out and shot twice at him and then he ran to his mother's house through the alley. The witness then went to the home of the defendant's mother and located the gun. That the defendant, Johnson, told the witness he had bought the gun a month before on King Street in Alexandria. That he had taken the gun to the bakery because some of the boy had been having trouble with Scandalis and he expected trouble. That he feared Scandalis because some of the boys at the bakery were treated pretty rough by him. On cross-examination, witness testified at the time he arrested the defendant he was fully dressed in old clothes. That the conversation as related was held in
33 the police car and later at the police station. The witness then identified the defendant's signature upon a statement which had been taken by officer Tolson at headquarters, on December 19.

AUBREY M. TOLSON was called as next witness for the Government to testify substantially as follows: That he is a detective sergeant connected with the homicide squad. That he investigated the shooting of one George Scandalis on the 18th of December 1938. That he first went to the bakery at 476 L Street and was present when the photographs, Government Exhibits 1, 2, and 3, were made. That he at that time made the sketch, Government Exhibit No. 4, which has previously been admitted into evidence. That he had a conversation with the defendant in the sergeant's room at No. 4 precinct. The witness then testified as follows:

He told me that he had been working at this bakery on L Street between eight and nine years and that about three years ago he left there for three months and went into the C. C. C. Camp, came back and took up his work. He stated on Saturday, the 17th, that is the day before the shooting, that he went to work at 12 o'clock noon. Around 2 o'clock in the afternoon he was paid off by the head boss. After he was paid off he went back into the mixing room and he was told by George, the deceased, that he didn't want him any more. He then went back to to see the boss who paid him off. He asked him why he was being laid off by George. He stated that the boss didn't know, that he would see into it and to come to work the next day. He then went on home.

He said on Sunday afternoon, that is, December 18, between two and two-thirty in the afternoon he left his home and went to the bakery. He went in for the purpose of seeing Thomas, the head boss. He stated that Thomas wasn't in. Then he went back 34 into the mixing room where he saw George, the deceased. He asked him why he was laid off and he told him he didn't have time to talk to him and to get out. He stated that at that time George caught hold of him, one hand around his waist and the other hand at the back of his neck and a man by the name of Brown and another Thomas, who is part owner, separated them, and it was at that time that he pulled his gun from under his belt and fired one shot. When he fired that shot he stated that George fell toward the barrel and reached for something, and at that time, he fired a second shot and then he went out.

I asked him if it was his gun he did the shooting with. He stated that it was. I asked him how long he had that gun. He stated that he bought it, as I recall, three or four months before the shooting, in Alexandria, Virginia, on King Street; that he paid \$6.50 for the gun and he gave the name of Adams at the time he purchased the gun.

Q. "He purchased the gun under the name of Adams?"

A. "Yes, sir. That is about the only conversation, as I recall, I had with him at the station house."

Witness testified that as a result of his examination of the other witnesses he held a further conversation with the defendant, on Monday, December 19, in the homicide office. That the defendant at that time stated that the reason he brought the gun to the bakery was because he had seen the way that the deceased had acted in discharging other people from the place and he thought perhaps he might have some trouble with him.

35 Witness testified that the distance from 476 L Street to the New Jersey address of the defendant was seven-tenths of a mile. That the conversation which the witness had with the defendant was reduced to writing and signed by the defendant in the presence of the witness. The witness identified the signature of the defendant and his own signature as witnessed. That the written statement was taken on the second occasion which he talked with the defendant. That the conversations he had on the first and third time he talked with the defendant were not reduced to writing.

The Government then offered in evidence the statement of the defendant which was read to the jury. Statement being as follows:

“OFFICE OF THE HOMICIDE SQUAD,

“METROPOLITAN POLICE DEPARTMENT,

“Washington, D. C., Sunday, December 18, 1938, at 6:25 p. m.

“Subject: Death of George Scandalis, white, age 40, late of 471 H Street SW., on December 18, 1938

“Statement by Detective Sergeant Aubrey M. Tolson, of the Homicide Squad, to William Fleming Johnson, colored, age 22, of 1112 New Jersey Ave. SE.:

“Johnson, you are held on account of the death of George Scandalis, white, age 40, who came to death at Providence Hospital, at 3:45 p. m., this date, December 18, 1938, said death the result of gunshot wound to chest received when shot with a revolver held in your hand or hands, about 3:00 p. m., this date, Sunday, December 18, 1938, in the Athens Bakery Shop at 476 L Street SW.

36 “‘You have admitted to me that you are the one who shot George Scandalis, which resulted in his death. I now ask you to make a complete statement so that it can be taken down on the typewriter, but before doing so, I care to advise you that you make this statement of your own free will, without any force or promises being used or made to obtain same, also that this statement will be used at your trial, if necessary. After hearing what I have told you, do you want to make a statement?’”

“Answer by William Fleming Johnson: ‘Yes, sir, I want to tell about it.’

“STATEMENT

“‘I am married, having been married about three years and I live with my wife at 1112 New Jersey Avenue, Southeast. I started working at the Athens Bakery, 476 L Street SW., right after I left school, about eight or nine years ago. I’ve worked everything around there but recently my work has been scaling dough. About three years ago I left the bakery and went to a C. C. C. Camp and stayed there about three months and when I got out of camp I went back to the bakery and I’ve been working there ever since. Yesterday, December 17, 1938, I went to work there at 12 noon and I worked till about two o’clock when the head boss, Thomas Stathopoulos, paid me off as he always done on Saturday afternoon. Right after I was paid off, George Scandalis, who is the shop foreman, came to me and told me that he wouldn’t need me any more after. After I got through what I was doing, I went to Thomas Stathopoulos, the head

37 boss, and I told him that George had told me he wouldn't need me any more. Thomas told me he didn't know why Scandalis had laid me off, that he would see him and find out what it was about and told me to come back today, December 18th. About five minutes to three o'clock today, I went to the bakery and when I got there Thomas Stathopoulos was not there. I went into the back to see George Scandalis and he told me that he was too busy to talk to me. I told him that I only wanted to see him for a minute to ask him why I was laid off. He told me to go away. Before I could tell him anything else he grabbed me with one arm around my waist and his other hand around the back of my neck. Another, Thomas, who is part owner in the shop, I don't know his last name, and Willie Brown, who works there, separated us. When I got loose, I pulled my gun from my belt and I shot him. After I shot him, I went around to my mother's house, at 482 M Street SW. I told her what I had done; I laid the gun on the table and I went home, where the police came and arrested me. I took the police around to my mother's house, where we got the gun back. That's all I know about it.

"Questioned by Detective Sergeant A. M. Tolson:

"Q. What were your working hours at the bakery?

"A. I had to be there at 3 o'clock every afternoon, with exception of Saturdays, when I had to be there at 12 noon. I had no regular quitting time.

"Q. What is your salary?

"A. Fifteen dollars a week.

"Q. How long has George Scandalis been your boss?

"A. Ever since he came there, about three or four months ago.

38 "Q. Have you ever had any trouble with George Scandalis before yesterday?

"A. No, sir, I always tried to stay out of his way.

"Q. Do you know why he fired you?

"A. No, sir.

"Q. Did he ever tell you, you were not doing your work right?

"A. No, sir. He just told me that he was laying me off and putting on another man.

"Q. On December 17, 1938, when he fired you, did you and he have an argument?

"A. No, sir.

"Q. Knowing that you was fired, why did you go back to see him today?

"A. To find out why I was fired or what I had done.

"Q. What time did you leave your home today?

"A. Between two and two-thirty p. m.

"Q. Where did you get the gun that was used in shooting?

"A. I bought the gun about two months ago in Alexandria, Va., on King Street. I paid \$6.50 for it.

"Q. What name did you give at the time you purchased the gun?

"A. I gave the name of Harold Adams. I forget the address I gave, but I didn't give my right address.

"Q. Why did you give a fictitious name and address when you purchased this gun?

"A. I've owned two or three guns and broke them up and I bought this one to sell to a fellow at the bakery, whose name is Gus, I don't know his last name. When I told him I had the gun he told me to bring it around to show it to him.

39 "Q. When did you put the gun in your belt?

"A. I put it there before I left home today.

"Q. When did you load it?

"A. I loaded it the same night I bought it, and it has been loaded ever since.

"Q. Have you been in the habit of carrying this gun on your person?

"A. No, sir; I never carried it.

"Q. Why did you carry the gun to the bakery today?

"A. I carried it today, because I knew by the way George acted to other boys when he fired them that I thought I would have some trouble with him.

"Q. How many cartridges did you have in the gun?

"A. Five, that's all it holds.

"Q. How many shots did you fire?

"A. I fired two shots.

"Q. Were you and George Scandalis facing each other at the time you fired the shots?

"A. Yes, sir.

"Q. How far apart were you?

"A. About twelve feet.

"Q. At the time you fired the shots, did George have anything in his hands?

"A. No, sir; he didn't have anything in his hands. After I shot he reached over to a barrel to grab something and I shot him again. When I shot him the second time he fell over on the barrel.

"Q. Did he have anything in his hands when he was tusseling with you?

40 "A. I didn't see anything in his hands.

"Q. Just where were you in the bakery when you fired the shot?

"A. We were in the mixing room; I was standing at the north end of the dough-mixing machine and George was at the south end.

"Q. How many people were in this room when the shooting occurred?

"A. There were several persons in there.

"Q. I now show you a .32 caliber, nickel-plated Harrington & Richardson revolver, No. 138287, and the letter 'A' on handle, and I ask you if this is your gun and the gun you shot George Scandalis with, while the bakery at 476 L Street, S.W., about 3:00 p. m., this date, December 18, 1938?

"A. Yes, sir. That's my gun and the gun I shot him with.

"Q. Can you read and write?

"A. Yes, sir.

"Q. How far in school did you go?

"A. To the ninth grade.

"Q. Is there anything further that you want to add to this statement that you haven't already covered?

"A. Yes, sir; the man that I shot goes around bulling and cussing out the men who work under him for no reason at all, and the working hours: You work every day of the week and you never get a day off; and if you take a day it comes out of your pay. I had to go to work at 3 o'clock sharp every day except Saturday and wouldn't get off until about five o'clock, or maybe later, the next morning.

41 "Q. Johnson, you have read your statement, my questions and your answers to them and have you made a true statement about this shooting, of your own free will, without any promises or force being made or used by anyone to obtain same?

"A. Yes, sir, it is a true statement and I have made it of my own free will.

(Signed) WILLIAM FLEMING JOHNSON.

Witnesses:

AUBREY M. TOLSON, D. B. (Signed.)

Statement completed at 7:25 p. m. 12-18-38."

Whereupon, the Government closed its case in chief.

Defendant's Counsel then time moved the court for a direct verdict of not guilty on the first degree murder, on the grounds that the testimony thus produced would not warrant a conviction of more than second degree murder.

LUTHER HENRY was called as first witness for the defendant and testified substantially as follows: That he works at the Athens Bakery and has known the defendant, William Johnson, for a period of four or five years. That he had known George Scandalis for a period of about six months. That during the time that Scandalis and the defendant had worked together he had never seen any trouble or fighting between them. But that he knew that they did like each other. That George Scandalis was a large man, weighing some two hundred pounds. That he knew other people in the community who knew the defendant and that his reputation in the community
42 for peace, quiet, and good order were good.

VIO L. CLATTERBACK was called as next witness for the defendant and testified substantially as follows: That he had known the defendant, William Johnson, for fifteen years. That his reputation in the community for peace and good order was good.

WILLIAM F. JOHNSON, the defendant, was called as a witness in his own behalf and testified substantially as follows: That he is 22 years of age, lived at 1112 New Jersey Avenue, SE. That he was married living with his wife at the time of his trial. That on Saturday, December 17, he was paid off by the head boss and about 3 o'clock George Scandalis, his foreman, told the defendant he would not need him any more. The defendant asked the head boss why George had laid him off, was informed that the boss did not know the reason and suggested that he come back on Sunday and find out from George, who was not then at the bakery. That on Sunday morning, December 18, the defendant left home at about 12 o'clock. He went to the bakery to see if there were any orders on the board. He stayed there five or ten minutes and then went around on M Street, there he re-

mained until about 2 o'clock. He then came back to the bakery and went upstairs where he saw Brown and West. He tried to sell the gun to one of them to get enough money to pay his rent. He then went downstairs and walked back into the oven room and asked George Scandalis why he was laid off. That Scandalis told him to go away he was too busy to be bothered with him. That before the defendant could say anything more, Scandalis hit him on his
 43 side, twisted his arm, and threw him on the floor. That he put his knee in his back. That Thomas and Brown separated them and Thomas walked out to the front with the defendant. That he stayed out in front for five or ten minutes. That he came back into the bakery and went upstairs to clean himself up. He came downstairs and went into the mixing room. That as he opened the inside door, Scandalis was standing on the inside fixing dough. He looked up and started towards the defendant. That Thomas was standing between the defendant and Scandalis and Thomas said, "Don't bother the boy no more." Scandalis made a break towards him and the defendant pulled out his gun and said, "Don't bother me no more," and Anthony hollered, "Look out he's got a gun." Scandalis jumped at me and I fired. He went over and it looked like he went over for something. The defendant was excited and without realizing it the second shot was fired. He then ran outside and went home. That the defendant was not angry with the deceased and did not intend to shoot him but merely wished to keep him from bothering the defendant again. That he was afraid to death of Scandalis. That Scandalis had always been unfriendly and had bothered him. That he would knock up against him, push him and step on his feet unnecessarily. That at one time prior to this Scandalis had wanted to lay off the defendant and put Bill Thomas on in his place. But the boss put the defendant back to work.

The COURT. "What bearing has all this?"

Mr. O'BRIEN. "This is leading up to a provocation as to the treatment the deceased gave him all the time."

The COURT. "That does not justify the killing, does it?"

44 Mr. O'BRIEN. "But certainly that would be a provocation."

The COURT. "Do you mean to say that there may be a theory upon which it is admissible? I am asking you, is it because of fear in general of this other fellow?"

Mr. O'BRIEN. "That is right. The continual nagging and the fear he had for the man."

The witness continued substantially as follows: That when the boss told Scandalis to put the defendant back in his job, Scandalis said, "Next time I will take care of that myself." That he took the gun with him when he left his home in the morning. That two or three days prior to this he had talked about the gun with Edward West and wanted to sell the gun to him. On cross examination the defendant that it would take fifteen minutes to walk from his house to the bakery. That the first time he talked to George on Sunday, and when George grabbed him he did not yell for help because he did not have time. That at the time he bought the gun about two months prior to the shooting, he bought it under the name of Adams because he thought he would sometime want to sell it or get rid of it and did not wish to have the gun traced to him if someone else

should get into trouble over it. That on Saturday, prior to the shooting he had only been paid about five dollars because he had drawn on his salary earlier in the week. That he did not tell the police he intended to pawn the gun to a man by the name of Gus or to Edward West. But that had been the purpose of his carrying the gun on that day. That he did not need to be rehired by

45 anyone before he could carry out orders on Sunday morning. That he had not loaded the gun on Sunday morning but that it had been loaded since the first night when he bought it. He testified that immediately prior to the shooting when he entered the mixing room he did not know that George was there near the door. That he was going in the room to see West. That he did not have the gun in his hand when he entered the mixing room but pulled it from his belt as George approached him. That after the shooting he ran because he was scared and excited. That he did not pull out the gun on the first occasion when George assaulted him because he did not think of it and he had no intention of shooting George. That when he did shoot he shot only to protect himself. That he did not have any scratches or bruises as a result of the assault but that his clothes were messed up and covered with flour. That he signed the statement at headquarters voluntarily. He stated that at the time of the shooting there was an ice pick kept at the mixing machine. That he did not see Scandalis with the ice pick but that he was afraid that he might have it.

By the Court. Q. Johnson, what did you do? Did you go from upstairs downstairs into the room where George was?

A. I came downstairs, and I went back where George was.

Q. What did you go into that room for?

A. I went back in there to see Willie Brown.

Q. In the mixing room?

A. Willie Brown was back in the oven room.

Q. Did you not go in there to see George at all?

A. No, sir. I didn't.

Q. You were not angry with George?

A. No, sir.

Q. You were not het up or angry when you went in there the last time?

46 A. No, sir.

Q. Why is it that you say you shot George?

A. I shot George the first time to keep him from hurting me.

Q. You shot him to keep him from hurting you?

A. Yes, sir.

Q. What was he doing that hurt you?

A. He was coming toward me to jump on me again. He looked up and saw me coming and he stopped.

Q. You were between him and the door?

A. Yes, sir. I just got inside the door.

Q. Who was in that room?

A. Nobody was in the room at the time but myself and George and William Anthony. That was all I saw in there at the time I went in.

Q. Just the three of you?

A. Yes, sir.

Q. Why did you say you shot him?

A. I shot George because he was coming toward me. He hurt me after he jumped on me. I pulled out my gun after he was coming toward me. I told him, "Don't bother me no more," and he still continued to come toward me and he jumped at me and I shot him.

Q. Were you afraid of him?

A. Yes, sir.

Q. What were you afraid he was going to do?

A. I was afraid—I don't know what he was going to do because they had a lot of things around there.

Q. What feeling did you have in your own mind at the time?

A. At the time there was an ice pick he had over there near the mixer. He was chopping ice with it.

47 Q. Did he have the ice pick in his hand?

A. I don't remember seeing him with it. I didn't see it in his hand, but he was over that way.

ALICE JOHNSON was called as the next witness for the defendant and testified substantially as follows: That she was the wife of the defendant and was living with him at the time of the trouble. That he left home around 10 or 11 o'clock and she did not see him again until after the trouble. That she had been at home all day and she would have seen him if he had returned to the house. On cross-examination the witness was questioned as follows:

Mr. McLAUGHLIN. "When he came home at 3 o'clock did he tell you he murdered a man?"

Answer. "No, he did not."

48 JOSEPHINE JOHNSON was called as next witness for the defendant and testified substantially as follows: That she lived at 482 M Street, was the foster mother of the defendant, William Johnson, having raised him from a child of a few months. That she did not see William Johnson on December 18 until after the trouble had occurred. That the defendant had not been there to her home at any time earlier in the day. On cross examination she testified that the defendant came in at about 3 or 3:30 in the afternoon and threw a gun on the table, telling her that he had just shot a man. That he took the bullets out of the gun, left them there with the gun and that he left there. That she threw the cartridges out of the door. That the gun was thrown out the back door and it was later recovered by the police.

AUBREY M. TOLSON was then recalled as a witness and testified that the mixing room was fourteen feet wide in the front part, that a semi-partition ran across the room at approximately twenty-six feet from the entrance door. That the rear portion of the room was approximately twenty feet in width. That the blood spots on the floor were twenty-four feet from the swinging doors at the front of the mixing room. That there were numerous machines, crates, trays, and other objects lining both walls of the back room.

WILLIAM ANTHONY was recalled as a witness and testified substantially as follows: That he had known the defendant for about three

and a half years and that his reputation for peace and good order was pretty good.

At this time the defense closed its case and renewed the
49 motion for a direct verdict as to first degree murder. Over-
ruled, exception granted.

The Government in rebuttal presented the following witnesses.

WILLIAM BROWN was recalled as a witness and testified substantially as follows: That he did not see George Scandalis on top of the defendant during the scuffle in the mixing room. That the defendant did not attempt to pawn or sell the gun to him before the shooting. On cross examination the witness testified that he is still employed at the bakery.

EDWARD WEST was recalled as witness in rebuttal and testified substantially as follows: That the defendant did not attempt to pawn or sell the gun to him at any time prior to the shooting. On cross examination the witness testified that he was still employed at the bakery.

THOMAS STATHOPOULUS was recalled as a witness in rebuttal and testified substantially as follows: That on Sunday, December 18th, prior to the shooting he pulled Scandalis up off of Johnson.

At the suggestion of the court an interpreter was called and the witness testified that he did not pull Scandalis up off of Johnson. On cross examination the witness testified that he did not separate George and Johnson from fighting. That he did not see George with a hold on the defendant before he, the witness, led the defendant from the room.

Whereupon the Government closed its evidence. The jury was
excused until 9:45, March 2, whereupon the court adjourned.

50 The Court reconvened at 10 o'clock on March 2, and prayers
presented by the Counsel for the defendant was discussed at
the bench and the trial proceeded to argument.

Charge to the jury

The Court (PROCTOR, J.): Gentlemen of the jury, the indictment, boiled down, charges that the defendant, William F. Johnson, contriving and intending to kill George Scandalis, purposely and of his deliberate and premeditated malice did shoot and kill the said Scandalis.

Now, you, as experienced jurors, know that the indictment itself is no evidence of guilt. It is merely the formal accusation which the defendant is called upon to answer.

There is a presumption at the outset of the trial, which abides with the defendant throughout the case, unless and until you find that presumption to be overcome by evidence convincing to you beyond a reasonable doubt, that he, the defendant, is innocent. That is the presumption of innocence which is accorded to every defendant. The burden of proof is upon the Government to prove the guilt of the defendant beyond a reasonable doubt.

You have heard the term "reasonable doubt" explained. However, in view of the seriousness of this charge, I feel it necessary to define

it again to you. You will recall that it is said to be a doubt based upon reason, one arising out of the evidence or lack of evidence. It is such a doubt as will, after a full and impartial consideration of all the evidence, leave a juror's mind so undecided as that he is unable to say he has an abiding conviction of the defendant's guilt; 51 that is, a settled conviction which he feels will continue to stand by him in the days to come and justify in his mind and conscience a verdict of guilty.

Now, it is apparent from that definition that reasonable doubt is not a mere whimsical or capricious doubt or one based upon conjecture or imagination, or aroused by feelings of sympathy or mercy, or hesitation to perform the unpleasant duty of convicting an accused. It must be a doubt appealing to the reason and approved by a conscientious judgment.

It is not necessary that the guilt be proved beyond all doubt and to an absolute certainty. Ordinarily, happenings between men cannot be proved with that degree of certainty. The law recognizes that to be so; that is, proof to an absolute certainty as to many of the happenings between men is unattainable. Therefore, the law, in its wisdom, does not require proof beyond all doubt and to an absolute certainty, but, with a proper regard for the life or liberty and good name of the one accused of a crime, it does set up as a fair standard of protection the requirement that the charge against a defendant be proved beyond a reasonable doubt.

Now, the indictment as I have outlined it to you charges the crime of murder in the first degree. There are lesser degrees of unlawful homicide, murder in the second degree, and manslaughter. These lesser degrees are necessarily included within this charge of the highest degree of murder. In this case, as is usual in the charge in murder cases, it does present for your consideration the question whether or not the defendant is guilty at all, and if guilty, of what degree of unlawful homicide he is guilty.

52 It is the contention of the Government that the defendant is guilty of murder in the first degree, because he did deliberately kill George Scandalis. On the other hand, it is the contention of the defendant that he is not guilty, because in killing Scandalis he acted in self-defense.

He admits that he fired the fatal shot. That is not in dispute. Therefore, in view of the claim of self-defense, logically that is the first question for you to consider. That meets you on the threshold of your consideration of the case.

What is self-defense? Under what circumstances has one the right to kill? Those are questions which I will endeavor to explain to you in a simple way, so that you may analyze the case as it refers to this defense in order to determine whether or not the defendant was justified in his act.

Now, the law accords to every man the right to defend himself against the assault of another. When he is assailed he has a right to meet force with force and to use such reasonable force as will protect his body from injury by one who may be assailing him.

If the attack is of such a nature as to create an honest belief in his mind that he is in danger of death or great bodily harm at the hands of his assailant and that belief is a reasonable belief, he has a right

to kill in self-protection. Now, you will see that that statement of the law gives to every man a fair and reasonable scope for self-protection, but it has its limitations, and it does not permit one to go beyond the reasonable bounds of self-protection.

First, there must be some actual menace, some actual physical movement indicating a menace and assault against him. 53 That must be of such a nature as to create in his mind an honest belief that he is in danger of immediate harm at the hands of his assailant. However, there must be more than that. The belief must be a reasonable one, such a belief as a man of reasonable intelligence, comprehension, and judgment would form if placed in similar circumstances to that of the defendant.

Therefore, you see that the law sets up the standard of reason, and leaves it for the jury to get at the true facts of the case and to determine therefrom whether there was danger of death or great bodily harm; whether it presented immediate and imminent danger, whether it created an honest belief of such danger of death or great bodily harm, and, finally, whether if those elements were present the belief was a reasonable one. Was it, according to your judgment, a reasonable belief?

If those elements of self-defense were present in this case and the defendant shot under the circumstances which did present the right of self-defense as I have defined it to you, then in the eyes of the law he would be legally justified and you will acquit him.

If upon all the facts and circumstances as you determine them to be, after a fair and full review of the evidence, there is raised in your mind a reasonable doubt that the defendant acted without legal justification, under those circumstances you will give him the benefit of the reasonable doubt, as I have defined that term to you, and acquit him.

Of course, if the defendant was menaced with death or great bodily harm and had this reasonable apprehension that he was 54 in such immediate danger, it would not be necessary that he should wait until Scandalis had actually struck him down or had actually gotten in the first blow. It is enough if Scandalis' actions were such as to give him apparent, honest, and reasonable belief that he was about to strike a blow against the defendant which would endanger his life or subject him to great bodily harm.

If it should turn out, on a calm and full review of the whole case, that it was not actually a dangerous situation so as to create a reasonable apprehension of death or great bodily harm, that would not be the test necessarily. The question is, what would be the belief of a reasonable man acting under circumstances in which the defendant was placed at the moment? That is the test.

Now, determine this question of self-defense. As I have said, if you believe the fatal blows were struck in self-defense, you will acquit him. If, on all the evidence, you have a reasonable doubt that they were struck unlawfully you will give him the benefit of the doubt and acquit him.

On the other hand, if the evidence leads you to believe that the defendant did not act in self-defense, then you will pass on to a consideration of the several degrees of homicide to determine of what degree of homicide he is guilty.

In logical order, you will begin with the crime of murder in the first degree. Murder in the first degree is the killing of a human being purposely and of deliberate and premeditated malice. That involves several elements.

The first is the element of malice, which is necessarily present in murder in the first degree and in murder in the second
55 degree. It is not that state of mind or heart whereby one has ill-will, hatred, vengeance, or other malevolent feeling against another. That is the common, lay understanding of the term. One may shoot in such a state of mind or heart, and if he did so it would explain the reason and motive for the crime, but that is not the legal understanding of the term. In law malice is the intentional doing of a wrongful act to the injury of another without legal justification.

Applying it to the crime of murder, it is the intentional infliction of a mortal blow without legal justification. Therefore, you see that malice really involves intent. That intention may be express, the formation of an express design to kill, and the execution of that design.

Where one shoots with the purpose to kill, formed before the shooting is done, it may be manifested by threats or other circumstances in the way of preparation or what not, anything which would appeal to your reasonable judgment fairly indicating the state of mind. That is for you to determine.

It may be without any of those positive evidences of intention except the nature of the act itself, as where one uses a deadly weapon and inflicts wounds in those parts of the body where the vital organs exist, so that by the act itself the natural and probable consequences would be death. Where one inflicts fatal wounds under those circumstances the jury has a right to infer that it was done with intention to kill, predicating, of course, that inference upon the natural and probable consequences of such an act. That is not necessarily so. You use your common sense and judgment to determine whether or not the circumstances do justify in a particular case the implication of an intention to kill.

If it does arise by such implication, in your reason and judgment,
56 then you have a right to find this malice, or this intention to kill, just as though it had been shown to you from the evidence in some express or positive way. Now, that is malice, and I dwelt upon it because it applies to murder in the second degree as well as to murder in the first degree.

However, there must be more than an intention to kill, or more than this element of malice, to constitute murder in the first degree. There must be the deliberate and premeditated purpose to kill. Now, what is premeditation? It is the positive formation of a design to kill, the processes of the mind forming a purpose to kill. Like any other operation of the mind preceding the doing of an act, it does not require any particular length of time. It may be as quick as thought itself and may follow immediately, instantly, coincidentally with the thought. That is premeditation. It is the positive formation in the mind of the intent to kill.

However, that is not enough. After the design to kill has been formed, it must be deliberated upon. There must be deliberation.

Deliberation is consideration of a preconceived design, reflection upon it, turning it over in one's mind, giving it second thought.

Now, if in this case the defendant formed the intent to kill and after the formation of that intent he gave it second thought, considered and reflected upon it, gave it deliberation, and as a result thereof came to a fixed and determined purpose to kill and in execution of that preconceived design, did shoot and kill pursuant to such deliberate and determined purpose, he then is guilty of murder in the first degree.

It is the position of the Government, the contention which
57 they make before you, that the evidence in this case does establish beyond a reasonable doubt that this defendant did form a design to kill, did deliberate thereupon, and did shoot pursuant to and in execution of such deliberate and premeditated purpose.

It is the Government's contention that, being angered and smarting under the discharge by Scandalis and the rebuff which he received at the hands of Scandalis when he sought to talk to him, he formed the intent to kill, that in anger, he went to his mother's home and got the gun pursuant to such intent. He went back, with the design to kill, and considering and reflecting upon his designed act, did, pursuant to a deliberate purpose, go into the bakery shop and as he came upon Scandalis did execute that deliberate and premeditated design.

If you believe beyond a reasonable doubt that he shot under those circumstances and in that state of mind, then he is guilty of murder in the first degree and you will find him guilty of murder in the first degree.

If you have any reasonable doubt as to that, you should give him the benefit of the doubt and pass on to a consideration as to whether he is guilty of murder in the second degree.

Now, murder in the second degree must have what I told you in my description of the term "malice". It is the killing of a human being with malice aforethought, a killing done with the positive and express intention to kill, but without deliberation, or under circumstances from which there arises a fair and reasonable inference, convincing beyond a reasonable doubt to the jurors, that there did exist
the intention to kill. If the defendant did shoot and kill

58 with this malice aforethought, but without deliberation, then he would be guilty of murder in the second degree. If you believe beyond a reasonable doubt that murder in the second degree is established, rather than murder in the first degree, then you will find him guilty of murder in the second degree.

However, if you have any reasonable doubt about it, then you should pass on to a consideration of the question whether he is guilty of manslaughter.

Manslaughter is the killing of a human being without malice. It may occur in many different ways. It forms a large subject. Because of the many ways in which it may occur, it would not be useful for me to do more than to point out the possible circumstances under which the question may be considered in respect to this case.

If the defendant, under the circumstances at the moment, had the honest belief that he was in danger of death or great bodily harm at the hands of Scandalis, but that was not a reasonable belief, one

that a man of reasonable judgment and prudence would have had under like circumstances, and yet it was an honest belief of the defendant and he acted honestly in self-defense, as he supposed he had the right to act by reason of his mistaken belief of the situation, that would relieve him of this element of malice and he would be guilty of manslaughter.

If he was assailed by Scandalis and because of menacing actions of Scandalis, he was in a great frenzy or passion of fear at the moment, and while in the grip and throes of such sudden fear and frenzy, he shot, as a result of impulses of an overpowering, sudden fear at the moment, rather than through the dictates of his reason; and he was acting in such a state of mind, it would relieve him of that element of malice, so that he would be guilty of manslaughter.

Now, I think I have sufficiently explained the various degrees of homicide as they may be presented in any of their aspects from the evidence in this case, and there are only one or two other matters of which I need speak. Suffice it to say, in leaving the subject of manslaughter, that if you find beyond a reasonable doubt that he is guilty of manslaughter, then, of course, your verdict would be guilty of manslaughter; but if upon all the evidence you have a reasonable doubt about that, as about the higher degrees of homicide, then you would give him the benefit of the reasonable doubt and acquit him.

Now, in argument counsel have referred pro and con to the possession of the pistol by the defendant, and he himself referred to it in his testimony. He said that he had the pistol without any thought of doing harm to Scandalis or anyone else, but that he had taken it from his home earlier in the morning with the hope of selling it or pawning it to one or two of the workmen in the shop, and that just before the shooting he had actually endeavored to do so. That is his story. In other words, it is the contention, and I think that of his counsel, that his possession of the pistol at the time of this episode does not have the significance which the Government gives to it, but that there was an honest explanation of the reason why he had it which excludes the idea of any deliberate purpose on his part to kill.

On the other hand, the Government contends that he went and obtained the pistol and armed himself with it and had it pursuant to his deliberate and premeditated purpose to kill and with a view to the execution of that purpose.

Now, there are the two viewpoints. It is for you to determine which one is right. It is not for me to suggest anything; but there are those two conflicting viewpoints, argued pro and con, for you to determine in connection with the possession of the pistol. You will, of course, determine fairly and impartially, upon the basis of the evidence, that particular feature of the case as it is reflected by all the other evidence in the case, as well as the particular evidence concerning the possession of the gun.

I think I have said that the defendant's discharge by Scandalis or Scandalis' refusal to discuss his discharge or other rebuff which may or may not have been inflicted by Scandalis upon this defendant would not justify the defendant in shooting and killing. His only justification would be self-defense. The law does not give to any man

the right to determine to kill another and to execute that design merely because he may have been mistreated by that person. The law for a civilized community necessarily excludes any such idea as that. It necessarily places upon a citizen the duty of seeking redress for any wrongs through the processes of the law and not to take unto himself the right to judge and to punish. If that were true every man would be a law unto himself and we would revert back to the days of barbarism instead of civilization.

Now, the defendant has offered, from the lips of several witnesses, evidence from which it is claimed in his behalf that it proves previous good reputation for peace and order in the community. That is a line of evidence permitted by law, upon the theory that it gives a defendant the opportunity to lay his previous life in the community before the jurors, so that it may be of some help to the jurors in determining the innocence or guilt of the defendant. It would show better the manner of man before them, so that they may determine better whether he is the sort of man who would do the thing charged against him.

Of course, it is important when such evidence is presented for the jury to determine whether or not it comes from a source and under circumstances which do establish good character. That is the first thing. In other words, you determine first whether good character is established by the evidence. You determine the weight to be given to the testimony of such witnesses.

If you find that it establishes good character or has a tendency in that direction, then, of course, you will give the defendant the benefit of it. You will treat it as an item of evidence in his favor, just as you would treat any other item of evidence arising from the whole ensemble of the evidence which would have a tendency to favor him. Consider it in that favorable light in connection with all the other evidence in the case, giving to it such weight and such influence in your considerations as you think it is entitled. If after fairly considering it, it has any tendency, along with the other evidence, or without the other evidence, to raise a reasonable doubt in your minds as to the defendant's guilt, you, of course, will give him the benefit of it; and, as has been said, evidence of good

character may be of such a nature in the particular circumstances of the case as that it would be the deciding factor with the jury in determining whether or not the defendant is guilty. Therefore, you consider it in the light of these instructions that I have given and accord to it such weight as you may think it is entitled to.

As to all the other evidence in the case, weigh it carefully, fairly, fully, all with a view of getting at the truth of the matter. Give to the testimony of each witness that weight which you think it is entitled by virtue of the impression which the witness made upon you at the time he testified, as well as by reason of the influence it may have in your judgment when viewed in the light of all the other testimony in the case. Look to the possible interest or lack of interest which each witness may have that may influence him in distorting or coloring his testimony on the one hand, or of speaking truthfully and honestly on the other.

The defendant himself has testified in his own behalf. Manifestly he has a great interest in the outcome of the case. You have a right to consider that. You should consider it in determining and weighing his evidence to determine whether or not it has influenced him to shade or falsify his statements to you. It is all a matter for you to determine. It is not for me to suggest what your findings should be with reference to the defendant, but you should consider it in that way.

If you find that any witness has knowingly testified falsely to some material fact as to which he could not reasonably be mistaken, you have a right to reject all the testimony of that witness, if
63 in your good judgment it should be rejected, because of the honest impression that it may give you that, being false in such fact, it is false in all; or you may believe that a witness, although testifying falsely as to some fact, has nevertheless testified truthfully as to others. If so, reject the false and accept the truth, because it is the truth which you are searching for.

It is a matter of using your common sense and good judgment and your experience, as men of mature knowledge of human nature and the affairs of men; all those things which ordinarily would influence you in considering matters in your own lives which are of great importance, and coming to a determination of them, which depend upon the statements and representations of others. Those are the considerations which you should apply in your evaluation of the testimony of witnesses here in court.

Finally, gentlemen, take the case without any feelings of sympathy or prejudice for or against the defendant or any other person connected with the case. Determine it fairly and fully and impartially, in the light of the evidence and the legal instructions which I have given you. Remember that the problem presented to you in this case is one which appeals to the best application of your reason and judgment, and which should not be determined from emotions or feelings of any kind. When a juror does bring to play, in an earnest effort to fulfil his duty under a solemn oath, his best ability to judge
64 through reason, common sense, and honest conclusion, the case which is submitted to him, only then does he assure himself that he will come to a correct conclusion. I am sure you will do that in this case, not only because of what I have said, but what I believe to be your own conscientious efforts to discharge your duties fairly and impartially toward this community represented as an organized society in the name of the United States on the one hand, and on the other hand, the defendant at the bar. That is all.

Mr. O'BRIEN. May I suggest, Your Honor * * *

Mr. McLAUGHLIN. May we approach the bench, Your Honor?

Mr. O'BRIEN. May I ask that they take into consideration the physical size and conditions of the two parties in this case?

The COURT. Yes; you may take that into consideration, along with all other circumstances. You may retire, gentlemen.

Defendant's Prayer No. 1

"The jury is instructed that in a trial for murder in the first degree when the defendant relies upon his right of self-defense, the acquisition of the pistol by the defendant and the defendant's right to the

possession of the pistol is not in issue. The question is whether the shooting was justified." Objection—Denied. Exception taken.

Defendant's Prayer No. 2

65 "The court instructs the jury that if the defendant had reasonable grounds to believe that the deceased intended to kill him, the defendant, or do unto him great bodily harm, and that such design would be accomplished, he, the defendant, need not wait until his adversary gets an advantage, but may immediately kill him if necessary to avoid the danger." Objection—Denied. Exception taken.

Defendant's Prayer No. 3

"The jury is instructed that the element of premeditated purpose to kill is an essential element of the crime of murder in the first degree, and that unless the defendant is proved beyond a reasonable doubt to have had that purpose to kill, then, even though all other element are present, he could not be found guilty of murder in the first degree, but could be guilty of murder in the second degree." Objection—Denied. Exception taken.

Defendant's Prayer No. 4

"The court instructs the jury that the defendant in this case was entitled to act upon appearances, and if the language and conduct of the deceased was such as to induce, in the mind of a reasonable and prudent man, under all the circumstances and existing, and viewed from the standpoint of the defendant, that death or great bodily harm was about to be inflicted by the deceased upon the defendant, it does not matter if such danger was real or only apparent; and if the defendant acted in self-defense from real and honest conviction as to the character of the danger, induced by the existence of reasonable circumstances he should be acquitted, even though he may have been mistaken as to the extent of his danger." No objection. Granted.

66

Defendant's Prayer No. 5

"The Court instructs the jury that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character would alone create a reasonable doubt, although without it the other evidence might be convincing." Granted.

Defendant's Prayer No. 6

"The Court instructs the jury that the possession of a gun by the defendant does not necessarily infer that he had any ill will against the man assaulted, but if from the evidence you find that he reasonably believed himself to be in danger of life or serious bodily harm and that he shot in self-defense you shall find him not guilty." Objection—Denied. Exception taken.

Defendant's Prayer No. 7

"The Court instructs the jury that personal violence and intentional injury to one's person is reasonably calculated to arouse the passion, and when killing is due to passion so aroused, it is deemed by the law as sufficient provocation to reduce the crime to manslaughter." Objection—Denied. Exception taken.

Defendant's Prayer No. 8

"The Court instructs the jury that in a prosecution for murder, if it appears that the defendant fired more than one shot, the evidence is for the jury to decide whether after the first shot any
67 of the rest were accidental. The defendant may still be acquitted if the shots were fired in the heat of conflict while he believed he was fighting for his life." Objection—Denied. Exception taken.

At the hearing of the motion for a new trial, the defendant offered an affidavit of one Robert Thomas, which stated that he, Thomas, was a witness to the shooting but did not testify at the trial, as newly discovered evidence.

The COURT. Let me have the affidavit. Go ahead.

Mr. O'BRIEN. Shortly after the trial was over, three or four days I would say, this man called and told me he wanted to quiet his mind as to what he said, and as to what he could remember saying at the inquest, and what he would have said at the trial if he had been there. I asked him if he wanted to make an affidavit, and he said "Yes." He stated, among certain things, that the deceased, George Scandalis, was coming from the oven room and, upon seeing the defendant here, did make for him in a threatening manner, and when he had come within 4 or 5 feet of him, that the shots were fired, but he was still proceeding towards the defendant in a menacing manner. I think that would have had a great weight with the jury if he had testified at the trial on that day.

That was very important to the defense. He should have been there, but we had no opportunity to get him before the trial, because I did not know anything about him.

The COURT. It is not newly discovered evidence. It is not a newly discovered witness. He was at the coroner's inquest and gave testimony there. You knew of his circumstances. You knew, in a general way, what his testimony would be.

Mr. O'BRIEN. I did not know of his circumstances, your Honor, because I did not have any report.

The COURT. I did not say you knew it, but the defendant knew it.

68 Mr. O'BRIEN. There were three or four witnesses here by the name of Thomas. The witnesses being of Greek nationality, and their names were so hard to pronounce, that they referred to each and every one of them by their first names. They were confusing to me not knowing there was a Thomas by the last name.

The COURT. I am talking about the defendant. He knew he was present. He certainly knew it after he heard the persons testify at the coroner's inquest. He was at the coroner's inquest and he heard this fellow Thomas testify, did he not?

Mr. O'BRIEN. Yes. I believe he had given me all the names of witnesses he knew. It did not come out in that way, and it did not appear on the Government's list of witnesses.

The COURT. Was his name on the Government's list?

Mr. McLAUGHLIN. I am positive it was, your Honor.

Mr. O'BRIEN. I have the Government's list here. We can look at it and see. Yes; it appeared on the Government's list of witnesses.

The COURT. I asked Mr. McLaughlin to see you gentlemen, and see whether you would concede that transcript of the coroner's inquest of this man's testimony without formal proof of it.

Mr. McLAUGHLIN. The Court means the testimony of Robert Thomas at the morgue.

Mr. O'BRIEN. Yes; I will concede that.

The COURT. There is also the statement that this man Thomas made to the police officers. Mr. Tolson is here to prove it. You may look it over.

Mr. McLAUGHLIN. I showed it to both of them, your Honor.

The COURT. Will you concede that that is the statement made by Thomas to Officer Tolson?

Mr. O'BRIEN. Yes; I will concede that.

The COURT. I simply want to know if we can eliminate formal proof on that.

Mr. O'BRIEN. Yes.

Mr. McLAUGHLIN. I might say, in reference to that, your
69 Honor, calling your Honor's attention to the transcript of William F. Johnson there on page 55 on cross-examination of one of the witnesses produced by the Government, a Mr. West, that the defense attorney, Mr. O'Brien, asked the Government's witness, Mr. West:

Q. Do you know Bob Thomas?

A. Sure, I know him.

Q. Did he work there?

A. He don't work there now.

Q. He did work there?

A. Sure.

Q. Do you remember when he first went to work there?

A. Bob?

Q. Yes.

A. Sure.

Mr. McLAUGHLIN. In the affidavit filed by Mr. Thomas to the defense attorney, at the conclusion of the affidavit, the way I read it, he leaves the inference that he had come to the Assistant United States Attorney during the course of the trial and told him that he was a witness. I might say, that he did not come to the District Attorney until the case was to the jury and the verdict was returned.

The COURT. I think it would be well for you to file an affidavit of a statement which counsel will concede, and have the record show just what the facts are with reference to what you have stated now; also, what the record shows as to this man having been summoned by the Government. Have you looked into that?

Mr. McLAUGHLIN. Yes, your Honor. For the purpose of the record, I have Mr. Clean, one of the deputy marshals, who served a summons at the address given to us, 636 Independence Avenue, South-

west, on February 8th, and that Mr. Robert C. Thomas was not located, and the deputy had been told by someone in the house that he no longer lived there. I might say again, that on February 16th of this year, a summons was sent out to locate Robert C. Thomas, in care of Officer Tolson, and Officer Tolson made a diligent search at that time and could not locate him. On February 24th, a summons was sent out in care of Mr. Tolson. At that time, I understand that information was received that this man was located in some hospital in Tennessee.

The COURT. Is there any question about that man, gentlemen? Would you want an affidavit?

Mr. O'BRIEN. No, I think not, your Honor.

The COURT. Are you willing to concede those substantially to be the facts? If you feel that impropriety is conceding it as substantially taken, Mr. McLaughlin will then eliminate the necessity of any further proof.

The COURT. May I consider these facts that Mr. McLaughlin has stated?

Mr. O'BRIEN. Yes.

Mr. McLAUGHLIN. I have the deputy marshal, Mr. Clean, here, who served the summons on February 8th, and I also have Officer Tolson at the present time, that he made a diligent search on February 16th and February 24th.

The COURT. I understand that counsel does not dispute that. It is a substantially true statement and it would be properly supported by the testimony of these witnesses. They are here, and there is no reason for going into that.

By the COURT. Did you have anything else?

Mr. McLAUGHLIN. The only thing further I might add is that the transcript at the morgue will show that the defendant, at that time, was represented by an attorney, Mr. Albert Goldstein.

By the COURT. Did you have something Mr. Chadwick?

Mr. CHADWICK. Yes. The reference to Bob Thomas made by Mr. O'Brien during the cross-examination of West was made with reference to a colored man named Bob Thomas who had previously worked in the bakery who has been otherwise referred to in this trial as Bill Thomas.

71 ROBERT THOMAS was called as a witness and testified in the following manner:

The COURT. I thought it would be better for me to examine the witness first. Of course, Counsel may examine later if you wish.

By the COURT:

Q. You are Robert Thomas?

A. Yes, sir.

Q. What is your business, Thomas?

A. Baker.

Q. How long have you been in that work?

A. Oh, since 1913.

Q. You work for the Athens Bakery?

A. I do.

Q. Were you working there the day George Scandalis was shot?

A. I was.

Q. How long had you been working there before that?

A. Well, I presume it was around, I would say, over six years.

Q. What?

A. Around six years, off and on.

Q. Off and on. You knew Scandalis then?

A. Yes, sir.

Q. And you knew Johnson, the defendant, the colored man who is sitting here [indicating]?

A. I did.

Q. Now, I want you to tell me, in your own way, Thomas, what you saw on that day of the murder between Scandalis and this defendant, Johnson.

A. Well, this man here, the accused, Johnson—

Q. (Interposing.) When you say "this man" mention the name.

72 A. Johnson, he came in the bakery, I presume, around 3 o'clock in the afternoon, Sunday afternoon, and he walked back to the oven room, where Scandalis was working in the oven room—

Q. (interposing.) That was what you call the oven room?

A. Yes; and I was working at the scaling machine, right at the door; but I couldn't see in there, and I seen Scandalis come out with this Johnson boy. He had him around the arms and he kind of shoved him forward like that [indicating], and the night foreman—Tom, we call him; I can't recall his last name—he got hold of him—hold of Johnson—so I went up and told Johnson he had better go out and not cause any trouble, that the police would come down and arrest him. So the night foreman he got Johnson and led him toward the door and told him he was going to fix—what he meant by that, I don't know.

Q. Who said that?

A. The night foreman.

Q. He was "going to fix"?

A. He was going to fix, but what he meant by that, I don't know.

Q. That is all you heard?

A. Yes; I went back to the oven room. Scandalis had gone back in.

I said, "George, it looked like you was going to have some trouble."

Well, he said he was strong enough that he could handle Johnson, so I went back to work. I think it was about a half hour later Johnson came into the front door back toward me—

73 Q. (interposing.) Where were you?

A. By the scaling machine.

Q. Is that where you were when the first trouble came on?

A. I reached down to get some dough to throw in the scaling machine. Scandalis came from the oven room and started toward this boy Johnson, and I could see he was pretty mad—

Q. (interposing.) Which way was Johnson coming?

A. He was coming in this way [indicating], toward Scandalis.

Q. Toward Scandalis?

A. Yes; Scandalis had passed me and when he passed me, if I recall right, I reached for some dough, and when I picked up some

dough to throw into the hopper, the machine, I happened to turn around, and Scandalis was about two or three feet in front of Johnson, and I heard the report of a gun and Scandalis grabbed himself like this [indicating].

Q. Where is that? In the stomach?

A. In the stomach.

Q. With both hands?

A. Yes. He wheeled around and he said something Greek. I don't know what it was. Then he turned around toward Johnson and kind of made a lunge for him.

Q. That was after he had been shot?

A. Yes, sir; and I couldn't swear to it, but I think Johnson said something to Scandalis, and after he made the lunge Johnson shot again and Scandalis he reeled over and kind of dropped over into an empty barrel, and this boy Johnson he went out in the front and I went out and called the ambulance.

74 Q. As you tell it, at the moment of the first shot you were putting this dough in the hopper?

A. As I recall.

Q. You did not see just what happened at that particular moment?

A. Well, yes. Scandalis was going toward Johnson.

Q. How close together were they?

A. I would say two or three feet.

Q. Did you see him fire the shot or did you merely hear it? Was your position such that you could actually see it?

A. No. Scandalis was standing in front. If that [indicating] was the door, Johnson came through this way [indicating] and I was here [indicating] and Scandalis had passed me and got in front of Johnson.

Q. He was between you and Johnson?

A. That's right. I saw the flash of the gun, but I didn't see the gun.

Q. You never saw it?

A. No.

Q. What was Scandalis doing at the last moment you saw him before the shot?

A. He was in the oven room.

Q. I mean as he passed you and went toward Johnson and Johnson seemed to be coming toward him. Is that what you said?

A. No; I think Johnson was stopped.

Q. Had stopped?

A. Yes.

Q. How far apart were they when Johnson stopped?

75 A. I would say two or three feet.

Q. And then did you see Scandalis do anything?

A. No, I can't say I did. As I said before, I can't swear that Johnson hollered, "Keep away," or, "Don't touch me," or something like that, and when I looked up—when I threw the dough in, I heard the report of the gun—I mean I was looking at the time of the report of the gun and Scandalis grabbed himself.

Q. When you looked up that is what he was doing?

A. Just as I looked up I heard the report of the gun. I turned around and had seen the flash of the gun, the first shot.

Q. When you say he grabbed himself, you mean he grabbed himself in his—

A. (Interposing.) In his abdomen.

Q. In the vicinity of his abdomen or stomach?

A. Yes.

Q. With both hands?

A. Yes.

Q. It was after that that he made the lunge toward Johnson?

A. Yes, before the second shot.

Q. And then it was that Johnson fired the second shot?

A. Yes, sir.

Q. Now, Thomas, I show you a paper. You signed this? That is your signature, I assume [handing a paper writing to the witness]?

A. Yes.

The COURT. To Counsel: I am referring to the affidavit which you filed in support of your motion for a new trial.

76

By the COURT:

Q. In the first place, did you write these words yourself or were they written by counsel after he had talked to you and then brought it to you to sign?

A. Mr. O'Brien—I was up to his office and he asked me and I told him and he typed that up.

Q. Did he type it by taking your own words at the time you stated them or after you told him and he sat down and, in his own words, attempted to write out what you said?

A. He wrote it on a pad.

Q. And then it was that it was typewritten later?

A. Yes, sir.

Q. At that time and at that place?

A. Yes; it was about three quarters of an hour.

Q. In this affidavit, passing over what you said occurred when Johnson first came in, when you saw Scandalis pushing him out of the room, you say, "about 30 minutes later, while I was standing by the scaling machine, I again saw Johnson enter from the front office."

That is true, is it not?

A. Yes, sir.

Q. Then you say, "George"—meaning George Scandalis—

A. (Interposing.) Yes, sir.

Q. "who at that time was coming out of the oven room also saw Johnson."

Q. Is that correct?

A. Yes.

77 Q. If Scandalis was in the oven room, unless he happened to be coming out, would he have been able to see Johnson?

A. No, sir.

Q. It just happened that he came out at the time Johnson came in?

A. Yes, sir.

Q. Then you go on to say, "I noticed at that time that George was advancing toward Johnson in a menacing manner."

What do you mean by "a menacing manner"? What was George doing?

A. Well, the look on his face. I think he was still mad at the first encounter he had with Johnson.

Q. He told Johnson to go out and not come back? Do you recall anything of that sort?

A. I just can't recall that he did.

Mr. McLAUGHLIN. Talk loud so that we can hear you.

By the COURT:

Q. You do not remember just what was said?

A. I can't recall.

Q. I assume, from what you have told us, that he at least was putting Johnson out.

A. He was putting him out, there's no doubt about it.

Q. Going back, you say, "at that time George was advancing toward Johnson in a menacing manner and I followed George."

Is that correct? That does not agree with your present testimony.

A. I was halfway between George and the scaling machine when I heard the shot fired. George started toward Johnson and I knew there was going to be trouble.

Q. I thought you told me a moment ago that you were putting some dough in the hopper.

78 A. It would only take a minute to reach down and throw it up.

Q. After the shot was fired you went back of George?

A. Yes.

Q. And you were somewhere back of him?

A. Yes.

Q. That is your recollection?

A. That is right.

Q. Did George raise his arm and make any motions to strike Johnson before the shot was fired?

A. No.

Q. What?

A. No.

Q. You are confident of that?

A. Yes.

Q. I am not trying to trip you; I simply want to get this cleared up. Tell us whether it is wrong or right. You say in your statement, "when George came to a point about three or four feet from Johnson he made a lunge for Johnson and a shot was fired."

Now, that is not according to your present statement. In other words, the point of it is this: Was the first shot fired before George made the lunge or afterward?

A. Well, when George got—

Q. (Interposing.) Just a minute. You told me here a moment ago that the shot was fired, you heard the shot fired, and then you saw George put his hands to his body?

A. That is correct.

Q. And then a moment later you saw him make the lunge or lurch toward Johnson?

79 A. That is right.

Q. In the affidavit you say that he did that before the shot was fired. Which is correct?

A. No; he made that lunge after he turned around again and faced Johnson. He made a lunge.

Q. Not before the shot was fired?

A. No, sir.

Q. Then, there is some mistake here, either on your part or Mr. O'Brien's part in writing the affidavit as it is written here; is that correct?

A. That is the way, as I told you, I seen George make a lunge for Johnson.

Q. I can readily see that there could have been a mistake on Mr. O'Brien's part.

A. It was probably when I said George advanced in a certain manner.

Q. I have that here, but as I understand you now, there was no lunging toward Johnson until after the shot was fired?

A. That is correct.

Q. I understand from what you said here that at no time until the second shot was fired did you see the pistol? It was when he fired the second shot?

A. I didn't see the pistol at no time.

Q. That was due to the fact that George Scandalis was between you two?

A. That is right.

Q. You do say in the affidavit that when you saw Johnson come in the room he did not appear to have anything in his hand at that time?

A. He did not.

Q. Now, you remember testifying at the coroner's inquest?

80 A. Yes.

Q. And also making a statement to Mr. Tolson, a detective in the homicide squad, and the statements you made at that time were according to your best recollection and understanding?

A. I was confused at the time I made that statement.

Q. You mean at the coroner's inquest?

A. Yes, sir.

Q. That testimony is quite lengthy. At any rate, Mr. Thomas, sitting here quietly as we are and going over this matter without any attempt to lead you one way or the other, but merely to get your best recollection of what happened, you think what you tell me now is correct?

A. Yes.

Q. That would be your best judgment about it today?

A. Yes.

Q. And your best recollection?

A. Yes.

Q. Yes.

Q. What you told here is a correct statement of what you saw and heard: is that right?

A. Yes, sir.

The COURT. Mr. O'Brien is not here. I want to say that what I have said with reference to statements in this affidavit is not intended in any way to infer that Mr. O'Brien may not have been entirely honest in the preparation of this affidavit. If there is any variance between this and the statement that the witness made here, I can readily understand how it could have occurred.

81 Do counsel have anything to ask? If they do, they may do so.

Mr. CHADWICK. I have nothing further.

The COURT. I think, however, in view of the situation now, it is better not to ask him any questions in the form of critical cross-examination, but just questions to get at the real truth of the matter. That is the way I have endeavored to examine the witness as I think you have observed.

Mr. McLAUGHLIN. Yes, your Honor.

Mr. CHADWICK. There is one point I would like to cover, and that is with reference to the relations between this boy and Scandalis prior to that time.

The COURT. Of course, you may do that. I have omitted that for the reason that, according to the testimony at the trial and according to the position which the Government took with reference to it, they themselves argued that there was this trouble between George Scandalis and Johnson and (that) they argued that was the motive. The treatment of Johnson by Scandalis was the motive for arousing the vengeance and anger of Johnson which resulted in his getting the pistol. I am assuming that is true. It was the theory that the Government presented to the jury. However, you may ask Thomas about that, if you wish. I have not asked him about it because I have not doubted that there was some bad feeling between the men.

Mr. CHADWICK. The particular feature which I have in mind at present is with regard to the physical aspect.

The COURT. You may proceed.

82 By Mr. CHADWICK:

Q. Can you tell us what type of man George Scandalis was?

The COURT. You mean physically?

Mr. CHADWICK. Yes.

The WITNESS. Well, he was a stout man. He told me he had wrestled Londos—Londos threw him out of the ring—and I know he was strong. I had worked with him. I recall now, later on after the testimony down the morgue, that Scandalis did have a little trouble down there with other men. That was the night foreman.

By Mr. CHADWICK:

Q. Now, with regard to the relationship between Scandalis and this boy, was there ever any feeling or any actions on the part of either of them showing that there were any hard feelings between them prior to the day of the shooting?

A. I know that Scandalis did not like Johnson.

Q. Can you tell us how it is that you knew that? How did you know that Scandalis did not like Johnson?

A. Scandalis did not want him on that gang. He wanted to put him on the night gang. Why, I don't know. He laid him off two or three times and then the manager got Johnson back in to paint the inside of the bakery. Then he would bawl Johnson out about the job—it wasn't the job; it was the paint—a poor class of paint.

Q. Now, was there ever at any time any physical contact between the two of them? Is it a fact that when George Scandalis would pass Johnson while he was working he would bump into him or step on his feet if his feet were in the way?

83 A. No; I never saw anything like that.

Q. You never saw anything like that?

A. No.

Q. Were there ever any hard words between the two of them other than on that day?

A. Well, that Sunday morning of the trouble Scandalis told me—or I asked him—no; it was another colored fellow down there, said Jerry was laid off. He said yes, he laid—well, I won't mention the name, and he called Johnson and said he laid him off, finally got rid of him.

Q. When was the first time that you saw Johnson on that day at all?

A. He was in there the earlier part of the day, but I can't recall what time it was.

Q. Did you see him at that time?

A. I saw him at the front door; yes.

Q. Did you talk to him at that time?

A. I spoke to him when I went upstairs.

Q. Was he upstairs then?

A. No; he was standing at the street door.

Q. Did you at any time that day see this gun?

A. I didn't see the gun.

Q. You did not see it before he came in?

A. No; I never did see it.

Mr. CHADWICK. That is all.

By Mr. McLAUGHLIN:

Q. Mr. Thomas, the statement you made to Officer Tolson was some time before you testified at the morgue; isn't that right?

A. That was before; yes.

84 Q. That was four or five days before you testified down there and you were cross-examined by Attorney Goldstein, who represented Mr. Johnson at that time; is that correct?

A. I don't know who he was.

Q. You remember that Johnson was represented by an attorney?

A. I know there was a couple of gentlemen there. I presume they were attorneys; yes.

Q. Either in that statement to Aubrey Tolson or in the testimony at the morgue did you tell about George Scandalis coming toward Johnson in a threatening or menacing manner?

A. I don't recall if I did.

The COURT. I think, Mr. McLaughlin, if I may suggest this, that the witness has stated that he did not use those words, that, in substance, he related the facts as he did here and evidently, in the use of the words by Mr. O'Brien, there was a possible misinterpretation. Whether it was a menacing manner depends on whether or not he was walking toward him in such a manner. He has described that George's actions did indicate that. He came out of the oven room, evidently, as Mr. Thomas describes it, without knowing at the moment that Johnson was there, and then he went forward toward Johnson and walked up close to him and went right toward him, when the shot was fired.

By the COURT. To the Witness.

Q. That is about correct, is it not?

A. Yes.

Upon motion of the Government the transcription of the testimony of Robert C. Thomas, as taken during the hearing before the Coroner's Jury, December 20, 1938, was included in the record.

85 Upon motion of the Government the transcription of the testimony of Robert C. Thomas as taken during the hearing before the Coroner's Jury, December 20, 1938, was included in the record. The testimony of the witness being as follows:

By the CORONER:

Q. Your full name?

A. Robert C. Thomas.

Q. Your residence?

A. 636 Independence Ave. SW.

Q. Your occupation?

A. Baker.

Q. By whom were you employed on Sunday afternoon?

A. Athens Bakery Company.

Q. How long have you been employed there?

A. Five or six years.

Q. Who was your boss?

A. His name is Tom. I can't call the last name.

Q. I see. Did you know a man by the name of George Scandalis?

A. Yes, sir. He was my foreman.

Q. Were you there on Sunday afternoon?

A. I was.

Q. Did you see a man by the name of William Fleming Johnson, know as "Jerry"?

A. Yes; I did.

Q. Tell us what you saw and what happened.

A. He came in on Sunday afternoon and passed me, and I spoke to him, and he spoke to me. He went in the other room where the foreman was working. I didn't pay any attention to him. When he came out I looked up and I saw that the foreman had a hold of his arm.

When you say the foreman, who do you mean?

86 A. George. And he left there and went on up the room and the night foreman got him and told him to go on out. I told him myself to go on out, that he was going to cause trouble and get locked up.

Q. You told him that, too?

A. Yes, sir. So I went on back to the machine I was working on and didn't pay any more attention to it. So, I guess it was about a half hour later when he came back, and I glanced up and saw him standing there and the foreman in front of him. Well, I bent over the trough—it had dough in it—and I heard a shot. So I looked up and I saw the foreman grab his stomach, and he turned around and said something. I started up the room and got half way up and heard another shot. The foreman grabbed himself and fell over a barrel. Then Jerry turned around and walked out of the room.

I ran out and called the ambulance. That is all I know about it.

Q. At the time you looked up after hearing the first shot, how close were these two men together?

A. I would say three to five feet.

Q. And the time the second shot was fired?

A. The same distance.

S. And you did notice him prior to that shot?

A. No, sir.

By Mr. CONLIFF:

Q. When you looked up and saw them about three to five feet apart, did George have a weapon in his hand?

A. No, sir.

Q. Could you see both hands?

A. Yes, sir. He had them on his stomach.

87 Q. And he had nothing in them?

A. No, sir.

By the CORONER:

Q. Do you recognize this picture?

A. Yes, sir.

Q. Now, where is your machine that you were working on?

A. It is not up here. It is back.

Q. Back in here?

A. No, back this way [indications].

Q. No, when you looked up, where was George; was he shown in that picture?

A. Yes, sir.

Q. Where?

A. Right here.

Q. Right in this barrel, is that it?

A. Yes, sir.

Q. All right, now, that is Exhibit "B". He is indicating this barrel right in the center, is that right?

A. Yes, sir.

Q. Where was Jerry standing?

A. He was standing about in the middle.

Q. Did he have his back toward you?

A. Who?

Q. Jerry.

A. No, Jerry was facing me.

Q. Jerry was facing you?

A. Yes, sir.

Q. And George?

A. George's back was toward me.

Q. And Jerry was up in here close to this third barrel in here, is that right?

88 A. In between that.

Q. So that as you were looking up at this man after the first shot had been fired, they were both in line with your vision?

A. Yes, sir.

Q. And Jerry was further away from you than George?

A. Yes, sir.

By Mr. GOLDSTEIN:

Q. Without recalling whether or not you know what was said, did you hear something said between them?

A. I didn't hear a word.

Q. Never heard a word?

A. No, sir.

Q. Did I understand you to say you saw them standing together before you leaned over to put your dough in the oven?

A. When I got up from the trough to look up, I saw Jerry standing there and George in front of him.

Q. Now, this is before the first shot?

A. The first time I looked over, Jerry was coming this way, and I bent over the trough again and heard the shot and looked up.

Q. I thought you said—I might be mistaken, Mr. Thomas. If I am, you correct me—that before you leaned over to put your dough in the oven—

A. No; the machine.

Q. The machine, rather, you saw them standing together, some three or five feet away; then when you heard the shot you looked up and saw George with his hands on his stomach, is that what you saw?

89 A. It was twice I looked up. The first time I looked up, Jerry was coming this way; coming in from the front of the bakery to the back.

Q. Where was George, standing still?

A. I don't recall.

Q. Where was Tom?

A. The night foreman?

Q. Yes.

A. I can't say.

Q. Can you say that you saw him at all?

A. I did see him; yes.

Q. The first time you looked up?

A. No, I can't say I did.

Q. You don't remember whether you saw him or not?

A. No; I don't.

Q. But you do remember that they were from three to five feet away every time you looked up from the time Jerry stopped?

A. I didn't see Jerry stop the first time.

Q. You did not?

A. No; because I was bent over the trough.

Q. Can you tell us whether or not George laid hands on Jerry?

A. No; I can't tell you. George had hold of his arm when he came out of the oven room.

Q. He did?

A. Yes, sir.

Q. When was that, the first time you looked up?

A. That is when they passed me; yes.

Q. Was that the first visit or the second?

A. The first.

Q. I am talking about the second time.

90 A. The second time I did not see George put his hands on him.

Q. After the first shot, did you see George walk towards him?

A. I don't know if he—He didn't walk. He kind of lunged at him.

Q. And holding his hands to his stomach?

A. Yes, sir.

Q. Now, at all times when you looked up, will you state whether or not George was facing him at all times? In other words, were they face to face?

A. Yes, sir.

By the CORONER:

Q. And when you say that he lunged, do you mean he lunged forward after the shot or did he lunge towards Jerry, as if he was springing at him?

A. No; I couldn't say he was springing, because when he turned around he said something, holding his stomach; then he went like that [indicating]. I don't know whether it was a lunge or the effect of the bullet.

Q. That is all.

By Mr. GOLDSTEIN:

Q. Might I ask you this: The first time you said that he went out, and you told him not to get into trouble, did he tell you that he had come back to see the big boss, Tom?

A. He didn't say anything at all.

Q. How long have you been working there, Robert?

A. Five or six years.

Q. How long have you known him?

A. About the same length of time.

91 Q. How long has George been working there, the foreman?

A. I would say around seven or eight months.

Q. Six or seven months?

A. He was there when I went back the last time.

Q. Who was the foreman before he hired George, do you know?

A. Yes, sir; a fellow named "Bill."

Q. He never had any trouble down there with any other foreman, did he?

A. No, sir; not as I know of.

Q. Did you ever have any trouble with George?

A. No.

Q. Do you know of anybody else down there having trouble with him?

A. No; I don't.

Q. Nobody?

A. I can't recall right now; no.

Q. Do you ever remember him showing a violent temper before other employees?

A. Oh, no.

Q. Never?

A. No.

Q. And this is the first trouble you had seen between George and an employe?

A. Not to that amount.

Q. I mean to throw him or lay hands on him?

A. No.

Q. Do you know why he fired this boy?

A. I didn't know the boy was fired until Sunday.

Q. That is when this trouble happened, is that right?

92 A. Yes, sir, I heard Sunday morning he was laid off.

Q. Did George tell you that?

A. I can't recall who said it, but I heard it.

Q. During none of this time, was the big boss there, Tom, the big boss, your employer?

A. At the time of the trouble?

Q. Yes.

A. I didn't see him.

Q. And you came to work at three o'clock?

A. No.

Q. What time?

A. Around 5:30 in the morning.

Q. That is all.

By the CORONER:

Q. Would you say that it was before 12:00 o'clock noon that you had learned that Jerry had been laid off?

A. It was before 12:00.

Q. And you, as an employe of the concern, would you go to ask your boss why he laid off another employe?

A. No, it was none of my business.

Q. None of your business. That is all. Thank you.

93 Respectfully submitted.

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John Edgar Chadwick,

J. FRANK O'BRIEN,

J. Frank O'Brien,

Attorneys for Defendant.

Received copy of foregoing this 17th day of July 1939.

CHARLES B. MURRAY,

Asst. Att. for U. S.

The Court certifies that the foregoing Bill of Exceptions contains the substance of all of the proceedings in this case and all of the evidence offered by the defendant and the Government, upon the trial of this case.

Given under my hand and seal this 18th day of August, A. D., 1939.

F. DICKINSON LETTS,

Justice.

[Endorsement on cover:] No. 7442. Johnson, Appellant vs. United States of America. United States Court of Appeals for the District of Columbia. Filed June 19, 1939. Joseph W. Stewart, Clerk.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 15 1940

Joseph W. Stewart

No. 7442

CLERK

**United States Court of Appeals for the
District of Columbia**

OCTOBER TERM, 1939

WILLIAM F. JOHNSON, APPELLANT

v.

UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

DAVID A. PINE,

United States Attorney.

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United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939

No. 7442

WILLIAM F. JOHNSON, APPELLANT

v.

UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The deceased, George Scandalis, came to his death on December 18, 1938, by virtue of gunshot wounds of the chest and abdomen (R. 13). The conceded testimony in the case was that these wounds had been inflicted by bullets from a gun discharged by the appellant.

On the 18th day of December 1938 William Johnson was employed at the Athens Bakery, located at 476 L Street Southwest. He had worked at the bakery on and off for a period of five years. Prior to December 18 he had been working there about six months. On December 17 William Johnson was approached by his foreman, George Scandalis, for whose death Johnson is now being tried, and was told that he would be laid off for a period of two weeks. Johnson left the bakery on December 17 and returned on December 18 at about 3:00 P. M.

He went upstairs in the bakery and met other colored boys and discussed with them the matter of his having been laid off. He then went downstairs and back to the oven room where he saw George Scandalis. After some conversation,

George Scandalis escorted the defendant out of the oven room into the mixing room, where he turned the defendant over to Thomas Slathopolulas, a fellow employee, and told the defendant to go about his business, that he did not want any trouble and if he gave him trouble he would call the police. Slathopolulas then walked the defendant to the front door of the bakery and told him to go out. The defendant went out of the bakery and returned in about thirty or forty minutes; he walked through the store of the bakery, looked into the mixing room, which is in the rear of the store, saw George Scandalis, pulled the gun from his pocket, walked in the direction of Scandalis, and, when within five or ten feet of him, fired twice. The defendant then ran to the home of his foster mother and there emptied the gun and threw it on the table. The gun was later recovered by police, the defendant was arrested and made certain statements pertaining to this case to the police.

ARGUMENT

THE QUESTIONS INVOLVED

The record (R. 10) sets forth six assignments of error, but for the purpose of this brief, appellant suggests four assignments of error as follows: (1) The Court erred in not granting a new trial on the basis of newly discovered evidence; (2) the verdict was contrary to the weight of the evidence; (3) the Court erred in its charge to the jury on the law of the case; (4) the appellant was denied due process of law.

I

THERE WAS NO NEWLY DISCOVERED EVIDENCE

The appellant filed an affidavit made by one Robert Thomas (R. 6) about two weeks after the verdict and before the motion for a new trial was argued, which stated that he, Thomas, was an employee of the bakery and was an eyewitness to the shooting but was out of the city at the time the case was tried and therefore was unable to testify at the trial. It further stated that he consulted the United States

Attorney on the day of the trial and was told that he was not needed as a witness in the case.

It is the contention of the appellant that the testimony of Mr. Thomas was newly discovered evidence and was not available to him during the trial and states facts of such a nature that had the affiant testified before the jury, the probabilities are strong that the jury would have returned a different verdict.

On December 20th, 1938, a coroner's inquest was held on the death of George Scandalis, at which inquest affiant Robert Thomas was a witness and testified (R. 46). The appellant was represented at the inquisition by attorney, Alfred Goldstein, which inquest was reported stenographically (R. 38). He later made a written statement to a member of the Homicide Squad in which he corroborated the testimony of the other witness, and it was the intention of the appellee to call Robert Thomas as a witness. The record (R. 38) will show that the appellee made a diligent search to locate Thomas, by sending out several summonses, and also named him as a witness to be used by the prosecution on the list of government witnesses furnished the appellant before the trial (R. 37).

The hearing on the motion for a new trial was continued several times at the request of the Court because Thomas had left the city after he had made the affidavit. The motion for a new trial was later heard, at which time Mr. Thomas testified (R. 38). The Court, after hearing his testimony, was of the opinion that it was substantially the same as his statement to the police and his testimony at the coroner's inquest. It was merely cumulative reaffirming what other eyewitnesses stated at the trial.

It is the contention of the appellee that Thomas was not a newly discovered witness, but was known to the defendant before the trial and due diligence upon his part would have made the witness available for the trial. The Court in its desire to do substantial justice continued the motion for a new trial several times so that it could hear the testimony of Thomas before it ruled on the motion.

It is within the sound discretion of the trial court to grant a new trial on a motion of newly discovered evidence and unless there is an abuse of such discretion it is not grounds for an appeal.

Rich v. Mark, S. C. D. C. 42 W. L. R. 419.

Mandis v. Midgett, 49 App. D. C. 139, 261 F. 1019.

The appellant states in his brief that Thomas appeared the last day of the trial and before the trial had closed and was advised by the prosecution that he was not needed as a witness. The Record (R. 37, 38) will show that Mr. Thomas did not appear until after the trial had closed and the verdict returned.

II

THE VERDICT WAS NOT CONTRARY TO THE WEIGHT OF EVIDENCE

The testimony of all the eyewitnesses was in substance the same—making due allowance for natural inconsistencies. Nothing was said by any of them to indicate that Johnson fired in self-defense. No conversation took place between the men before the shooting. The appellant cites no authorities, but satisfies himself with his opinions on questions of fact.

Edward West: Scandalis got hold of Johnson and took him outside in the morning. About forty-five minutes later, Johnson came back as Scandalis was coming from the oven room to the mixing machine. "Scandalis was going back, and Johnson took out his pistol and shot him three times." When he shot Scandalis, the latter "grabbed his stomach and turned and ran in the corner." No testimony to indicate Scandalis made a move towards Johnson (R. 15).

Steve Demos—Tom put Johnson outside. About forty or forty-five minutes later, Johnson came back. Scandalis "came down through the mixer." When the men were about eight feet apart, Johnson pulled a gun to him and shot him twice. After Scandalis was hit in the stomach, "he laid down and rolled back this way" (indicating) (R. 17).

William Anthony—"I saw the boss (Tom) throw Johnson out. Shortly thereafter Johnson come in with the gun. I hollered at him and Scandalis turned around, tried to walk

away from him or grab him. As soon as he made the motion, Johnson shot him. Scandalis bent down and hit the barrel and he tried to get up again, and he hit him another one" (R. 17).

III

THE COURT'S INSTRUCTIONS WERE PROPER

(A) THE CHARGE ON SELF-DEFENSE

In his discussion on this point, appellant shows confusion of the rules on self-defense. It is well established that two aspects of a defendant's belief that he is about to be attacked must be inquired into, the honesty of such belief and its reasonableness. A man must not only believe he is in danger, but he must have a right to believe so. He cannot be a law unto himself. When the reasonableness of his belief is inquired into, he must be held to the standard of a reasonable man, and his youth or lack of education, or other individual characteristics cannot excuse him.

A reading of the Court's instruction on this point, beginning on page 28 of the record and ending on the bottom of page 29, will show the error of the appellant in the statement on page 7 of his brief, that the effect of the Court's charge "is to make the test one of intelligence and to substitute hindsight as a test rather than the circumstances as they presented themselves" to appellant at the time of the shooting.

In addition to the Court's instruction to the jury on self-defense the appellant was allowed to read to the jury a prayer on self-defense offered by the appellant (R. 35).

Price v. United States, 51 App. D. C. 106; 276 F. 628.

The Court held the following instructions good law:

If a person is so circumstanced or so situated that he honestly believes and has reasonable grounds for the belief that he can save himself from death or serious bodily harm only by taking the life of an assailant, he has the right to protect himself. In other words, if you believe from the testimony that Price in this case was in such a situation that he honestly be-

lieved and had reasonable grounds to believe, that he could save himself from serious bodily harm only by killing Smith then he had the right to kill him.

The Court also said:

For it would be legally impossible for a man honestly to believe a thing, unless reasonable grounds existed for the belief; in other words, the law regards as pretense, and not belief, that which has no reasonable basis.

Thomas v. United States, 55 App. D. C. 89, 2 F. (2d) 190,
Jackson v. United States, 48 App. D. C. 272,
Brown v. United States, 256 U. S. 335.

III-B

COURT'S INSTRUCTIONS WERE PROPER

SECOND DEGREE MURDER

It is the contention of the appellant that the element of malice in second-degree murder must be implied malice and not express malice.

Second-degree murder is the killing of a human being with malice aforethought without deliberation and premeditation.

Malice aforethought is the criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart, a purpose to do a wicked act; and it may be either express or implied in law. Express malice is when one with a sedate deliberate mind and formed design does kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases when no malice is expressed, the law will imply it, as when a man wilfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without considerable

provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight, or upon no apparent cause.

Malice in second-degree murder can be either express malice or implied malice.

The Court's instruction to the jury on page 31 of the record on second-degree murder was a correct and complete statement of the law, and was favorable to the defendant.

Boyd v. United States, 45 U. S. 857.

Allen v. United States, 164 U. S. 492.

United States v. Meagher, 37 Fed. 879.

Wharton on Homicide, Ch. 2, sec. 2.

III-C

COURT'S INSTRUCTIONS WERE PROPER

MANSLAUGHTER

The appellant now complains that the trial Court only "devoted one very short paragraph to the subject of manslaughter and its application to the case." The fact is that the Court devoted three paragraphs (R. 31-32) to the question of manslaughter; and it is submitted, this charge goes beyond the law in favor of the defendant in that the jury was not told that it must find adequate provocation in order for a killing in "great frenzy or passion of fear" to be reduced to manslaughter. In this connection the Court instructed as follows (R. 32):

If he was assailed by Scandalis and because of menacing actions of Scandalis, he was in great frenzy or passion of fear at the moment, and while in the grip and throes of such sudden fear and frenzy, he shot, as a result of impulses of an overpowering sudden fear at the moment, rather than through the dictates of his reason; and he was acting in such a state of mind, it would relieve him of the element of malice, so that he would be guilty of manslaughter.

Surely the appellant cannot complain of such an action for it gave him more than he was entitled to.

Appellant further complains that "no enlightenment was given to the jury on the aspect of cooling time." It is true that the expression "cooling time" was not used by the trial Court in his charge to the jury but it is clear that the charge given properly and adequately states the law on the distinction between first- and second-degree murder and on the requirements of premeditation and deliberation for the former (R. 30-31). The Court said: "Deliberation is consideration of a preconceived design, reflection upon it, turning it over in one's mind, giving it second thought" (R. 31). That a man must be cool and calm at such a time was clear to the jury.

Furthermore, there is no evidence whatever that appellant killed in hot blood due to anger or resentment.

The following questions were asked the defendant by the Court (R. 25):

By the Court:

Q. Johnson, what did you do? Did you go from upstairs downstairs into the room where George was?

A. I came downstairs, and I went back where George was.

Q. What did you go into that room for?

A. I went back in there to see Willie Brown.

Q. In the mixing room?

A. Willie Brown was back in the oven room.

Q. Did you not go in there to see George at all?

A. No, sir; I didn't.

Q. You were not angry with George?

A. No, sir.

Q. You were not het up or angry when you went in there the last time?

A. No, sir.

Q. Why is it that you say you shot George?

A. I shot George the first time to keep him from hurting me.

Q. You shot him to keep him from hurting you?

A. Yes, sir."

The question of hot blood deals with a state of mind and the starting point of the inquiry into its existence must necessarily be the testimony of the one whose mind it is. The testimony of such a person is not always conclusive of his state of mind (as when one might claim to have been acting in self-defense), but surely one cannot deny, as did the defendant here, that he was angry and then claim he acted in hot blood due to anger and resentment and expect a charge on that point. No such charge was asked for and the Court need not give a charge not applicable to the evidence, and indeed even contrary to the facts as testified to by the defendant himself.

See *Kinard v. United States*, 68 App. D. C., 96 Fed. (2d) 522.

IV

APPELLANT WAS NOT DENIED DUE PROCESS OF LAW BY VIRTUE OF HIS REPRESENTATION AT THE TRIAL

The appellant contends that because of the inexperience of his attorneys who represented him at the trial he was denied due process of law. He also requests the Court to take judicial notice of its own record of the trial, but at no time does he specify any particular instant during the course of the trial that he did not receive due process of law, because of the inexperience of his attorneys.

It is true that the appellant's brief was not filed on the date set by the Court, but this error was corrected by the filing of a motion to extend the time which was granted by the Court. The Court in its desire to do substantial justice appointed Mr. Collins, an experienced attorney, to assist with the preparation of the appellant's brief.

The Court at the time of arraignment of the defendant did appoint Mr. Chadwick and Mr. Koonin to represent the appellant but it is the understanding of the appellee that Mr. O'Brien was retained by the mother of the appellant to represent him at the trial of the case (R. 2). In the case of *Bostic v. Rives*, W. L. R. Vol 6, No. 1, the Court said: "The burden was upon the appellant to prove that the lawyer assigned to defend him was not competent."

CONCLUSION

It is respectfully submitted that the evidence which the jury heard was properly admitted; that the jury was fully and accurately instructed on the law applicable to the case; that the verdict was fully supported by the evidence; and that the conviction should be affirmed.

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